Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BUREAU VERITAS,

Petitioner,

vs.

CARBOTRADE SPA, ON ITS OWN BEHALF AND AS ASSIGNEE OF ESSEX CEMENT COMPANY, TITAN CEMENT CO., S.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

1. Whether, where choice of law factors other than the vessel's flag point "indiscriminately to much of the globe," the Court of Appeals impermissibly abandoned "the most venerable and universal rule of maritime law" by declining to apply the law of the flag to an alleged maritime tort occuring on the High Seas, thereby directly contravening this Court's dictate in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and its progeny?

2. Whether the Court of Appeals created an irreconcilable conflict with at least two other circuits by declining to follow this Court's presumptive rule favoring application of the law of the flag and, instead, applying the erroneous and outmoded doctrine of *lex loci delicti* to a maritime tort occurring on the High Seas?

LIST OF PARTIES

The parties to the proceedings below are those set forth in the caption. The Petitioner BV has no corporate parent or subsidiary. The foregoing statement is provided in accordance with Rule 29.6 of the Rules of the Supreme Court of the United States.

TABLE OF CONTENTS

	Page
Questions Presented	i
List Of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions	1
Statement of the Case	1
Reasons For Granting The Petition	5
Conclusion	18
Appendix A - Carbotrade S.P.A. v. Bureau Veritas, No. 95-9155 (2d Cir. October 31, 1996)	A-1
Appendix B - Carbotrade S.P.A. v. Bureau Veritas, No. 92 -1459 (Koetl, J.) (S.D.N.Y., October 19, 1995)	A-21
Appendix C - Carbotrade S.P.A. v. Bureau Veritas, No. 95-9155 (2d Cir. January 9, 1997)	A-44

TABLE OF AUTHORITIES

Cases:	Page
Anastasidais v. S.S. LITTLE JOHN, 346 F.2d 281 (5th Cir. 1965)	14
Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir. 1959)	8, 9
Bible v. Chevron Oil Company, 308 F. Supp. 312 (E.D. La. 1969)	8
Cargill, Inc. v. Bureau Veritas, 902 F. Supp. 49 (S.D.N.Y. 1995)	16
Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240 (3rd Cir. 1980)	15
Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218 (3rd Cir 1991)	12
DeMateos v. Texaco, Inc., 562 F.2d 895 (3rd Cir. 1977)	12
Great American Ins. Co. v. Bureau Veritas, 338 F. Supp. 999 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 235 (2d Cir. 1973)	2, 16
Fogelman v. ARAMCO (Arabian Am. Oil Co.), 920 F.2d 278 (5th Cir. 1991)	7
Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 (1970)	8, 9, 10, 11, 17
In Re Ocean Ranger Sinking Off Newfoundland, 589 F. Supp. 302 (E.D. La. 1984)	8
Jose v. M/V/ FIR GROVE, 1991 AMC 1406 (D. Ore. 1991) (not officially reported)	8
Lauritzen v. Larsen, 345 U.S. 571 (1953)	*passim*
Marc Rich & Co. v. Bishop Rock Marine Co. (The Nicholas H), [1995] 3 All E.R. 307 (H.L.)	4, 16

Cases: **Page**

Nunez-Loazano v. Rederi, 634 F.2d 135 (5th Cir. 1980) 14

Ritchie Enters. v. Honeywell Bull, Inc., 730 F. Supp. 1041 (D. Kan. 1990) 8

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 5, 7, 17

Sack v. Low, 478 F.2d 360 (2d Cir. 1973) 7–8

Sundance Cruises Corp., et al. v. American Bureau of Shipping, 7 F.3d 1077 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1399 (1994) 5, 17

Statutes:

Judicial Code, 28 U.S.C. §1333 4

Treatises:

Restatement, Conflicts, §377 8

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The defendant, Bureau Veritas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 99 F.3d 86. The opinion of the United States District Court for the Southern District of New York (Koetl, J.) (App. B) is reported at 901 F. Supp. 737.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on October 31, 1996. A timely petition for rehearing *in banc* was denied on January 9, 1997 (App. C). This Petition for a Writ of Certiorari is due on April 9, 1997 and has been timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS

Review of the court of appeals' decision is sought due to the majority's failure to follow legal precedent established by this Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and the resultant conflict this ruling has created with other circuit courts which have followed *Lauritzen*. The decision below did not involve the interpretation of any specific statute or constitutional provision.

STATEMENT

A. The Facts

The STAR OF ALEXANDRIA was a bulk carrier owned by Caribene Investments Limited ("Caribene"), a corporation which was validly registered under the laws of Gibraltar, a dependency of the United Kingdom (A-15). The vessel

carried a British certificate of registry, flew the British flag (A-15) and was insured through a protection and indemnity club[1] whose management was located in the United Kingdom. (A-20) Caribene's stock was held by entities located in Gibraltar and Liberia (A-18).

The Plaintiff, an Italian company, time-chartered the STAR OF ALEXANDRIA to carry cargoes of cement and coal during a sixty day, transatlantic round trip voyage between the United States East Coast and other agreed "safe ports." The charter party between Caribene and the Plaintiff, dated February 28, 1989, expressly required any disputes thereunder to be submitted to arbitration in London. (A-24). Similarly, the bill of lading signed by the ship's master provided that disputes arising out of the carriage of the cargo were to be submitted to British courts.

Plaintiff sub-chartered the vessel to Essex Cement Company ("Essex"), a partnership based in New Jersey which purchased the cement that was to be laden aboard the STAR OF ALEXANDRIA. (A-23) Pursuant to the sub-charter between Plaintiff and Essex, the cargo was to be loaded at the port of Eleusis, Greece and transported to Port Newark, New Jersey. (A-22)

Since 1985, the STAR OF ALEXANDRIA had been "classed" by the Defendant, BV, a classification society[2] headquartered in France. (A-4) The initial certificates of approval for construction, safety equipment, load line, radiotelegraphy and pollution prevention were issued in London.

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[1] A protection and indemnity club ("P&I Club") is a form of underwriting entity whereby vessel owners pool their resources for insurance purposes.

[2] The majority below recognized that BV "performs surveys to determine whether vessels are in compliance with the classification society's rules and regulations, national laws and international conventions." (A-3). Notably, a class survey merely certifies that a vessel is in compliance with the society's rules - it does not warrant the vessel's seaworthiness. *Great American Ins. Co. v. Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 235 (2d Cir. 1973).

(A-15) Under BV's Rules and Regulations, the vessel was due for several inspections, including an intermediate survey,[3] in March, 1989. (A-4) The vessel's existing class certificate expired while the vessel was at Eleusis, Greece on March 20, 1989. Notwithstanding the expiration of the vessel's class, the owner tendered a notice of readiness, which was accepted by the cargo interests on March 21, 1989, and began to load its cargo on March 23, 1989. (A-27, 28). In the interim, BV's local office in Greece was called upon to perform the necessary inspections of the vessel (A-27). At the point when BV's surveyor extended the class certificate on March 29, 1989,[4] Caribene had already completed loading approximately 32,000 tons of cement, out of its total cargo of 33,389 tons. (A-28). The vessel sailed from Eleusis, Greece for Port Newark, New Jersey on the next day, March 30, 1989.

After encountering three separate incidents of unprecedented severe weather, the vessel cracked amidships and sank in international waters on April 17, 1989, losing her entire cargo. (A-28) The crew members were rescued by a British vessel, the RAVENSCRAIG, and then transferred to a United States Coast Guard cutter which transported them to Boston, Massachusetts. (A-15)

Since the vessel was registered in Gibraltar and flew the British flag, the United Kingdom Department of Transportation ("UKDOT") investigated the sinking. (A-28) The UKDOT concluded that the loss was caused by "negligence of the owner and crew, improper loading of the cargo and exceptionally stormy weather conditions." (A-28) The UKDOT

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[3] An intermediate survey is an internal examination of the compartments within the interior of the ship which must be conducted every four years. (A-25)

4 Ironically, the vessel was inspected on at least four occasions by a surveyor retained by the cargo interests. The cargo surveyor noted minor water leakage in the vessel's topside wing tanks; however, on March 21, 1989, the cargo surveyor passed the vessel notwithstanding, with the condition that the tanks not be ballasted during the voyage. (A-26).

also found that the vessel's owner had violated UK manning requirements by failing to have any British officers on board. (A-15).

Plaintiff commenced arbitration against the STAR OF ALEXANDRIA's owner in London, as required by the head charter. (A-5) The owner defaulted and, in view of the UK-DOT's finding that the owner violated British manning requirements, the owner's British protection and indemnity club declined coverage for the damages asserted by plaintiff. (A-5) Since Carbotrade, as a time charterer of the vessel, was potentially exposed for the cargo loss, its British-managed underwriter, The Standard of London, settled with the cargo owner, Essex, for $1.25 million and became subrogated to the claim. (A-23) Thus, as the subrogee of Essex, the plaintiff's interests here are vested in an underwriter which is managed in London (A-23) to the extent of the $1.25 million settlement. This action followed, essentially because of the owner's default and the refusal of its P&I Club to pay the claim, in which the plaintiff invoked the district court's maritime jurisdiction pursuant to 28 U.S.C. §1333(1).

B. The Proceedings Below

BV moved for summary judgment before the district court on the grounds that (1) controlling authority under British law, which was applicable to this loss, precluded the plaintiff's claim; (2) under United States law, BV owed no duty to plaintiff; and, (3) there was no evidence that either of the plaintiffs, Essex or Carbotrade, relied upon BV's classification certificates. In its opinion and order dated October 19, 1995 (App. B), the district court held that British law was applicable to this loss and that, under the controlling decision of *Marc Rich & Co. v. Bishop Rock Marine Co. (The Nicholas H)*, [1995] 3 All E.R. 307 (H.L.), classification societies such as BV owed no duty to third parties such as the plaintiff herein. The district court also found that United States law did not recognize such a duty on the part of BV and that, in any event, there was no evidence of justifiable reliance by the

plaintiffs[5] upon classification certificates issued by BV. The plaintiffs appealed from all of the district court's findings.

In a decision dated October 31, 1996, the majority below vacated the district court's order by holding that Greek law was controlling, and remanded for a determination as to whether Greek law recognized the existence of a duty on the part of a classification society to third parties. (A-14) BV filed a timely Petition for Rehearing In Banc, which was denied on January 9, 1997. (A-44)

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals Decision Is In Direct Conflict with the Supreme Court's Decision in *Lauritzen*

The international identity of the parties, coupled with events that pointed "indiscriminately to much of the globe," compel application of the legal anchor provided by this Court's holding in *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

1. While *Lauritzen* discussed seven factors in deciding which law should apply to a maritime tort claim, "(p)erhaps the most venerable and universal rule of maritime law...is that which gives cardinal importance to the law of the flag." 345 U.S. 571, 584. Indeed, as recognized by Judge Van Graafeiland in his dissent, "the weight given to the ensign overbears most other connecting events in determining applicable law." 345 U.S. 571, 585; (A-16). Although it was a Jones Act case, there is no question that *Lauritzen* choice of

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[5] In the proceedings below, plaintiff harkened to testimony from its surveyor that he "inspected" the BV certificate during his survey, implying that he would not have allowed the ship to sail if it had not been extended. The district court recognized that this argument was unconvincing, at best, since the surveyor had permitted loading to begin after the certificate had expired and before it was extended. Indeed, the surveyor had permitted 32,000 tons of the total cargo of 33,389 tons to be loaded *before* the certificate had been extended. The court also noted that plaintiffs concede there was never any direct contact with the defendant regarding the vessel.

law principles are not limited to "shipboard" torts, but "were intended to guide courts in the application of maritime law generally." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382 (1959).

As recently as 1993, the Second Circuit followed *Lauritzen* and its progeny in a case which is strikingly similar to that which is now before this Court, *Sundance Cruises Corp., et al. v. American Bureau of Shipping*, 7 F.3d 1077 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1399 (1994). There, as in this case, factors other than the flag pointed "indiscriminately to much of the globe". 7 F.3d 1077, 1082; (A-16). Following the dictates of *Lauritzen,* the court of appeals in *Sundance* found the "law of the flag" to apply "because of the flag state's clear and powerful interest in the actions that are at the heart of this case" *Sundance*, at 1082.

In this case, the one unifying factor "overbearing all others" is clearly the vessel's flag. *Sundance*, *id.* Further, if any state has a "clear and powerful interest" in the actions that underlie this case, it is the UK since:

a. the STAR OF ALEXANDRIA was subject to UK manning requirements (A-15);

b. the original certificates approving the vessel under BV's classification requirements were issued in London (A-15);

c. the UK Department of Transportation conducted an investigation of the casualty (A-15);

d. the owner's failure to comply with British manning requirements caused the STAR OF ALEXANDRIA's London based P&I Club to decline liability for the cargo owner's loss (A-15); and,

e. plaintiff's interests herein are vested in the Standard of London, a protection and indemnity club that is managed in the UK (A-23).

It is not clear why the court of appeals has done an "about face" from its holding in *Sundance* and, in so doing, departed from the principals established by this Court in *Lauritzen*. Indeed, Judge Van Graafeiland's dissent noted the incongruity between the court of appeals decision in this case with the holding in *Sundance*, stating "(t)his court recently reaffirmed the preeminence of the law of the flag in *Sundance*, *supra*, a case factually similar to the one at bar" and that, in affirming the district court's determination that Bahamian law applied, reemphasized "the importance of the law of the flag, which 'overbears most other connecting events in determining applicable law.'" 7 F.3d at 1082; quoting *Lauritzen*, 345 U.S. at 585 (A-20).

2. Moreover, the other considerations discussed by the Court in *Lauritzen*, when applied to the facts of this case, do not warrant the application of Greek law as the court of appeals erroneously concluded. These other *Lauritzen* factors include the place of the wrongful act, the domicile of the injured party, the domicile of the shipowner, the place of the contract, the inaccessibility of the foreign forum, the law of the forum and the shipowner's base of operations.

In another departure from the guidelines established by this Court in *Lauritzen*, the court of appeals mistakenly found that Greece was the "place of the wrongful act" since the last survey of the STAR OF ALEXANDRIA was conducted by BV while the vessel was docked at Eleusis. In reality, the weight given to this factor by the court of appeals is contrary to the dictates of *Lauritzen* and its progeny since "(t)he test of location of the wrongful act or omission...is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate." *Lauritzen*, 345 U.S. 571, 583. In the same breath, the *Lauritzen* court found that "the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none *that it usually is modified by the more constant law of the flag*." *Lauritzen*, at p. 584 (emphasis supplied) This principal was explicitly reaffirmed by the Court in *Romero*, 358 U.S. 354, 384, which continued to caution against "the mechanical application of a doctrine

like that of *lex loci delicti comissi.*" *Romero*, at p. 383. See also, *Fogelman v. ARAMCO (Arabian Am. Oil Co.)*, 920 F.2d 278, 282 (5th Cir. 1991) in which the Court held that "(t)he place of the wrongful act is accorded little weight in traditional maritime cases, in which the locality of the ship changes constantly."

In addition, by placing the locus of the plaintiffs' cause of action for negligent misrepresentation in Greece, the majority has ignored the fact that an essential element for the accrual of such a claim is damage, *Sack v. Low*, 478 F.2d 360, 365 (2d Cir. 1973) (cause of action for fraud does not arise until the loss is suffered). More importantly, in making such a finding the majority below has ignored traditional choice of law principals, since "the place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." *Restatement, Conflicts*, §377. When applied to a maritime claim, this principal would dictate that "'the place of the wrongful act,'...would be on the high seas..." *Jose v. M/V/ FIR GROVE*, 1991 AMC 1406 (D. Ore. 1991) (not officially reported). See also, *In Re Ocean Ranger Sinking Off Newfoundland*, 589 F. Supp. 302, 319, n. 18 (E.D. La. 1984), (..."injury is the last event necessary to make an actor liabile for an alleged tort..."); *Bible v. Chevron Oil Company*, 308 F. Supp. 312, 314 (E.D. La. 1969) (citing *Restatement of Conflicts, supra)*; and, *Ritchie Enters. v. Honeywell Bull, Inc.*, 730 F. Supp. 1041, 1046 (D. Kan. 1990) ("Where the wrong occurred is generally considered to be the place where the injury was suffered").

When applied to this case, "the place of the wrongful act" did not become fixed, as Judge Van Graafeiland properly concluded in his dissent, (A-18) until the STAR OF ALEXANDRIA broke up and sank on the High Seas. Since this last element of the cause of action alleged by plaintiff did not accrue until the ship was in international waters, the "place of the wrongful act" could not possibly be Greece as the majority concluded.

Under such circumstances, the majority should accordingly have looked to the law of the flag, as required by *Lauritzen*, in deciding which law to apply to this case. However, the majority's departure from criteria established in *Lauritzen* and its progeny does not stop here.

3. The majority erroneously relied upon *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306 (1970), and *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959), in support of its decision to look to the "base of operations" of, not just the vessel owner (as this Court did in *Rhoditis*), but to the plaintiffs and the defendant, BV. Putting aside the "facility with which (the court of appeals) 'pierce[d] the veil'" of the vessel's owner, Caribene (A-19), the court's holding represents an impermissible expansion of the principal in *Rhoditis* which was clearly not intended by this Court. In *Rhoditis*, the defendant was a Greek shipowner which was *de facto* owned and operated by a single shareholder who had lived in the United States for twenty five years and was a resident alien of the United States. The clear and obvious intent of this Greek shipowner, whose company reaped the benefits and protections of United States law on a daily basis, was to simply evade responsibility under the Jones Act for injuries to seamen sailing on vessels that routinely called at United States ports. Recognizing the unfair competitive advantage that a wooden application of *Lauritzen* would give to this defendant over those American shipowners which honored their obligations under the Jones Act, the Court looked beyond the "law of the flag" to the shipowner's "base of operations." Similarly, this Court's reference to the Second Circuit's decision in *Bartholomew* was limited to an acknowledgment of the liberal purposes of the Jones Act and approval of the concept that the "facade" of a vessel's operation should be disregarded where the actual contacts of its owner are within the United States. *Rhoditis*, *id*; *Bartholomew*, 263 F.2d 437, 442. Clearly, the decision below does not involve an owner attempting to frustrate the purposes of the Jones Act.

The majority opinion thus misapprehends both the *Bartholomew* decision which, by its own terms, was seeking to effectuate the "liberal purposes of the Jones Act" (*Bartholomew,* 263 F.2d 437, 441), and the facts at bar which fail to establish (a) that the owner was seeking to evade the law of Greece in flagging its vessel under UK law, or (b) that the substantial contacts with the UK and its sovereign interests are somehow outweighed by the fortuitous inspection of the vessel in, and thus the minimal contact with, Greece. *Bartholomew* at 263 F.2d 443.

Notably, since the vessel owner is not a party to this proceeding, it is questionable whether its "base of operations" should have even been considered at all by the majority. Nevertheless, the majority's misapplication of *Rhoditis* criteria caused it to misconstrue the "base of operations" of the STAR OF ALEXANDRIA's owner, Caribene, to support its application of Greek law. This approach evidenced another failure by the court to follow an explicit criterion established in *Lauritzen* which looks to the "(a)llegiance of the Defendant Shipowner." *Lauritzen*, 345 U.S. 571, 587; *Rhoditis*, 398 U.S. 306, 308. In *Rhoditis*, this latter formality was given less weight in the face of clear and incontrovertible evidence that, to do otherwise, would give the defendant "an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer.'" *Rhoditis*, at p. 310 However, the majority had no basis and, unlike the *Rhoditis* court, no compelling "policy" reason for doing so in this case.

In this case, the owner of the STAR OF ALEXANDRIA was a Gibraltar corporation with at least one shareholder in Gibraltar. (A-18) The vessel itself was registered in Gibraltar and subject to the manning requirements of the United Kingdom. (A-18, 19) Following the loss which is the subject of this action, the casualty was investigated by the United Kingdom Department of Transportation. The vessel owner's form of charter party, which was executed by the subrogated plaintiff, Carbotrade, called for London arbitration. Clearly, the

"allegiance" of the shipowner, within the meaning of *Lauritzen* and *Rhoditis*, was grounded in the United Kingdom.

The majority's mischaracterization of Caribene as a "shell corporation" was explicitly decried by Judge Van Graafeiland in his dissent, referring to findings of fact by Judge Paterson and Judge Koetl, as well as admissions by plaintiffs in the complaint and responsive affidavits, that Caribene was the owner of the STAR OF ALEXANDRIA. (A-18, 22–23) The majority's comment that the shipowner was "without assets" was equally unfounded: "Until the STAR OF ALEXANDRIA foundered on April 17, 1989, Caribene was its owner. To say that this large, 600 foot, ocean-going cargo vessel of 22, 267 gross tonnage with an insured value of $3 million and a chartering rate of $7,800 per day was not a substantial asset would be to blink reality." (A-19)

4. The majority below erroneously suggests that weight should be given to the base of operations of the plaintiff and then, through a selective misapplication of its own erroenous criterion, decides that this factor favors neither Greek nor British law. (A-12) Contrary to the conclusion of the majority below, *Rhoditis* did not decide, nor even suggest, that significant weight should be given to the plaintiff's citizenship. Indeed, the *Rhoditis* Court explicitly stated to the contrary, noting that "*the nationality of the seaman*, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country." 398 U.S. 306, 310 (emphasis supplied).

In this case, the majority's decision to consider the plaintiff's "base of operations," is simply not supported by *Rhoditis*, and its concomitant decision to ignore the law of the flag is contrary to *Lauritzen*. Ironically, if the Court had "taken its own advice" and in fact looked clearly through the veneer of the corporate plaintiffs, it would have seen that these interests, and thus the plaintiff's "base of operations," are being carried on by the Standard of London, a protection and indemnity

club managed from London. Obviously, if the court of appeals wished to give weight to this consideration, the presence of this London "base of operations" should have militated in favor of the application of British law, as the district court held and as Judge Van Graafeiland concluded in his dissent.

5. In another departure from the dictates of *Lauritzen* and *Rhoditis*, the majority suggests that the "base of operations" of the defendant, BV should be considered. Noting that BV simply had placed a surveyor at a Greek port where the plaintiff herein had chosen to send the vessel, the Court ignores the fact that BV is a French corporation, whose "base of operations" is unquestionably in France, and erroneously concludes that this factor favors the application of Greek law. This was yet another factor where the majority chose to "blink reality" (A-19). Had the Court analyzed this factor correctly, it would have concluded that this was one of many factors which pointed "indiscriminately to much of the globe," rather than to Greece. The law of the vessel's flag, the only constant in this complex equation which was appropriately mandated by this Court in *Lauritzen*, should have been applied.

6. In a further attempt to de-emphasize the significance of the vessel's "flag," the court of appeals discusses the 'flag of convenience" doctrine but makes no contrary finding with respect to the STAR OF ALEXANDRIA, stating "(w)e need not decide , however, whether the Star of Alexandria did indeed sail under a flag of convenience, because, even assuming that the district court was correct on this issue, we find that the factors favoring the application of Greek law greatly outweigh this factor." (A-13)

The purpose and effect of a "flag of convenience" was generally discussed by the court in *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218,227 (3rd Cir. 1991):

> "'Flags of convenience' are a comparatively new phenomenon developed after the conclusion of World War II by certain non-traditional maritime countries for economic reasons. The state whose flag was flown exercises 'minimum control over the

> activities and operations of these vessels.' E. Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 Am.J. of Inter. Law 604."

In contrast to nations which offer "flags of convenience, "(i)t is generally understood among nations engaged in maritime practice *that the state whose flag is flown exercises control over matters such as qualification of masters and officers of the ship, safety of the sea*, discipline aboard the vessel, *and investigation into instances of navigation causing destruction of life or serious physical damage*." 932 F.2d 218,227 (emphasis supplied).

This is precisely the measure of control which was exercised by the United Kingdom over the owners of the STAR OF ALEXANDRIA. The licensing requirements for the vessel's officers were dictated by British law (A-24), the casualty was investigated by the United Kingdom Department of Transportation and findings were made by the latter agency which determined the cause of the casualty and cited the owner's violation of the UK's manning requirements.

The majority points to testimony from the ship's manager, Palm Navigation, that the flag would have been changed if the manager had been aware of the UK's manning requirements. (A-13) While this statement might constitute an indictment of the owner's lack of concern over operational standards, it "only reinforces the conclusion that sailing under the U.K. flag was not done for evasive purposes." (A-19) To the contrary, "(t)he fact is that the vessel did not comply fully with U.K. law; and it is that very lack of compliance that led to this litigation." (A-19)

"There is nothing in the record to show that Gibraltar, an arm of the United Kingdom, is a flag of convenience country." (A-20) The vessel's registration with the dependency of Gibraltar, resulting in the attendant imposition of British manning and safety requirements, among others, leads only to one conclusion: that the vessel's flag was not one of convenience. The district court made an explicit finding of fact in

this regard (A-32) and this finding was not reversed by the court of appeals. (A-13)

7. Finally, the majority has chosen to discount completely the place of the contract, another *Lauritzen* factor which articulated "the tendency of the law [is] to apply in contract matters the law which the parties intended to apply..." *Lauritzen*, 345 U.S. at 589. In a case where the parties have made a choice of law in a contract, this consideration is an appropriate additional factor to weigh. Notably, the charter party between the subrogated plaintiff, Carbotrade, and the vessel owner called for arbitration in London and, in fact, arbitration was commenced against Caribene in London and a default taken. (A-28) Furthermore, the bill of lading issued by Carbotrade to its co-plaintiff, Essex, called for the application of British law. Although these criteria are not dispositive they inexorably point, together with the criteria discussed above, to the application of British law.

B. The Court Of Appeals Decision Has Created a Conflict With the Third and Fifth Circuits

The abandonment of the "law of the flag" by the court of appeals has created a conflict with other circuits which have followed the dictates of this Court in *Lauritzen*, *Romero* and *Rhoditis*.

1. Relying upon the criteria articulated in *Lauritzen*, the court of appeals for the Fifth Circuit in *Nunez-Loazano v. Rederi*, 634 F.2d 135 (5th Cir. 1980) relied upon the law of a Norwegian vessel's flag, the allegiance of the Norwegian shipowner and other *Lauritzen* factors which pointed "indiscriminately to much of the globe" in affirming the district court's decision not to apply the Jones Act to a Honduran plaintiff who signed ship's articles in the United States and was injured in Liberia.

Contrary to the emphasis given by the majority to piercing the corporate status of the shipowner, the Fifth Circuit rejected plaintiff's argument that jurisdiction should be retained

because the shareholders were "not 'exclusively Norwegian.'" 634 F.2d 135, 137

Similarly, in *Anastasidais v. S.S. LITTLE JOHN*, 346 F.2d 281 (5th Cir. 1965), the court of appeals relied upon *Lauritzen* criteria in affirming the dismissal of a suit by a Greek seaman who signed his employment contract in Greece and joined the vessel in Houston. Notably, plaintiff claimed that the "base of operations" for the vessel was in the United States and that he was damaged in Houston. Relying upon *Lauritzen*, the Fifth Circuit held that the "lex loci delicti test in maritime tort cases is necessarily of limited application 'because of the varieties of legal authority over waters (a ship) may navigate.' (citation to *Lauritzen* omitted)" 346 F.2d 281, 284.

The majority's decision to apply *lex loci* principals to this case is contrary to this Court's dictates in *Lauritzen* and, as indicated above, is in conflict with the Fifth Circuit.

2. The court of appeals for the Third Circuit has also followed *Lauritzen* and its progeny and, based on the majority's recent ruling, is also now in conflict with the Second Circuit. In *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240 (3rd Cir. 1980), four Venezuelan seamen who were killed aboard a vessel which was claimed to be owned by an Exxon subsidiary, brought suit against Exxon and its subsidiary in Delaware. Relying upon the principals articulated in *Lauritzen* and *Rhoditis*, the Third Circuit looked to the vessel's flag (Venezuelan) and noted that the allegiance of the plaintiffs, the place of the contract and the place of the accident all pointed to Venezuela. Notably, the court explicitly rejected the plaintiffs' claim that the court should look to the "base of operations" of the vessel's owner, which was argued to be in the United States, stating "ownership of the vessel does not, as the plaintiffs argue, provide the substantiality of contacts which would make this factor controlling." 613 F.2d 1240, 1247

The court's holding in *Chirinos* was consistent with an earlier ruling by the Third Circuit in *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3rd Cir. 1977) in which the Court refused

to "pierce the veil" of a Texaco subsidiary, which owned the vessel on which plaintiff was injured, and find that the owner's "base of operations" was in the United States.

The holdings in *Chirinos* and *DeMateos*, which are consistent with *Lauritzen*, are squarely in conflict with the Second Circuit's recent decision to look through corporate ownership at the "base of operations" of the vessel's owner. Further review by this Court is necessary to resolve this conflict among the circuits which stems from the majority's decision to stray from *Lauritzen* criteria.

C. The Petition Presents A Question Of Recurring Importance to the Maritime Industry Which Should Be Settled By This Court

Every day, classification societies throughout the world pass upon vessels' conformity with their respective guidelines. Unfortunately, a recent series of suits by cargo and vessel interests have sought to convert this activity into an alternate means of recovering damages that are caused by the vessel owner's breach of its non-delegable duty to furnish a seaworthy vessel. Notably, the courts have recognized these earlier cases for what they are - thinly veiled attempts to shift the shipowner's non-delegable warranty of seaworthiness upon a party which (1) has no such duty as a matter of law; (2) has limited time and opportunity to become familiar with the vessel (as opposed to the owner which, through the involvement of its crew and the passage of time, literally "lives" with its ship); and, (3) whose compensation for performing the inspection is but a sliver of the exposure which plaintiffs' interests seek to impose.

Notably, no suit against a classification society has met with success to date.

Specifically, courts applying U.S. law have refused to impose liability upon the classification society. See, e.g., *Great American Insurance Co. v. Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 235 (2d Cir. 1973) (burden of insuring a vessel's seaworthiness remains with the

shipowner and will not be shifted to the classification society); and, *Cargill, Inc. v. Bureau Veritas*, 902 F. Supp. 49 (S.D.N.Y. 1995) (classification society held not to be liable as an insurer or warrantor of a vessel's seaworthiness; and, classification society not liable for negligent misrepresentation absent proof that plaintiff actually and reasonably relied upon certificates issued by the society).

Courts deciding the question in the light of foreign law have also dismissed similar claims against classification societies. See, *Marc Rich & Co. v. Bishop Rock Marine Co. Ltd.* ("*The NICHOLAS H*") [1995] All E.R. 307 (H.L.) (classification society owes no duty to third parties under British law); and, *Sundance Cruises Corp., et al. v. American Bureau of Shipping*, 7 F.3d 1077 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1399 (1994) (classification society owes no duty to vessel owner under the law of the vessel's "flag" which, in that case, was Bahamian).

The court of appeals has accordingly decided an important and recurring question of federal maritime law which, as recognized by Judge Van Graafeiland in his strongly worded dissent, "abandons 'the most venerable and universal rule of maritime law[,]...which gives cardinal importance to the law of the flag,' *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953), in choice of law questions arising out of maritime torts." This holding represents a conflict with the principals established by this Court in *Lauritzen* and has created a conflict with the Third and Fifth Circuits, which still follow *Lauritzen* and its progeny, *Romero v. International Terminal Operating Co.*, 358 U.S. 354, (1959) and *Hellenic Lines Limited, et al. v. Rhoditis*, 358 U.S. 306 (1970)

A clear mandate is needed to guide courts in the future as to the law which should be applied under the above circumstances. Given the pervasive and daily role of entities such as BV which pass upon vessels' classification throughout the world, cases such as this are certain to arise in the future. Further review by this Court is accordingly essential to resolve the conflict which stems from the majority's decision to deviate from *Lauritzen* criteria.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 8, 1997

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1601 -- August Term 1995

(Argued May 28, 1996 Decided OCT 31 1996)

Docket No. 95-9155

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CARBOTRADE S.P.A., on its own behalf and as assignee of Essex Cement Company,

Plaintiff-Appellant,

-- v. --

BUREAU VERITAS,

Defendant-Third-Party Plaintiff-Appellee,

-- v. --

TITAN CEMENT CO., S.A.,

Third-Party Defendant.

----------x

B e f o r e : VAN GRAAFEILAND, WALKER, and LEVAL, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Koeltl, *J.*), reported at 901 F. Supp. 737 (S.D.N.Y. 1995). The district court applied the law of the United Kingdom in granting summary judgment to the defendant classification society after a ship, classified by the defendant as meeting international standards, sank. Plaintiff, which had chartered the vessel and sued defendant for negligence, argues that the district court should have applied the law of Greece, not the law of the United

Kingdom, and, if it had done so, summary judgment would have been improper.

Vacated and remanded.

Judge Van Graafeiland dissents in a separate opinion.

THOMAS L. TISDALE, New York, NY (Patrick F. Lennon, Christopher M. Hanrahan, Tisdale & Associates, New York, NY, on the brief), *for Plaintiff-Appellant.*

CHRISTOPHER B. KENDE, New York, NY (Bradley F. Gandrup, Jr., Wise & Shepard, LLP, New York, NY, on the brief), *for Defendant-Third-Party Plaintiff-Appellee.*

(Kenneth E. Gordon, Gordon & Gordon, P.C., New York, NY, on the brief), *for Amicus Curiae International Association of Classification Societies.*

WALKER, *Circuit Judge:*

Plaintiff Carbotrade S.p.A. ("Carbotrade") appeals from an opinion and order of the United States District Court for the Southern District of New York (John G. Koeltl, *District Judge*) that granted the motion of defendant Bureau Veritas ("BV") for summary judgment pursuant to Fed. R. Civ. P. 56(c). Carbotrade's suit followed the sinking of a vessel, the Star of Alexandria, which had been classified by BV -- negligently in the view of Carbotrade -- as complying both with international conventions and with BV's own rules and regulations. The district court, applying United Kingdom law, concluded that no duty was owed by a classification society, such as BV, to a third-party, such as Carbotrade. On appeal, Carbotrade argues that the district course erred in applying

United Kingdom law; that Greek law, or alternatively, United States admiralty law, governs this dispute, and that under either Greek or United States law BV may be held liable by Carbotrade for negligent misrepresentation. Carbotrade further argues that the district court erred in concluding that Carbotrade could not establish that it relied on the alleged negligent misrepresentations, BV owed Carbotrade a duty. We vacate and remand.

BACKGROUND

This controversy originated when the Star of Alexandria, a ship registered in the United Kingdom dependency of Gibraltar, sank on April 17, 1989, in international waters while en route to New Jersey from Greece. The facts surrounding the incident are fully set forth in the opinion of the district court, reported at *Carbotrade SpA v. Bureau Veritas*, 901 F. Supp. 737 (S.D.N.Y. 1995), familiarity with which is presumed. We summarize only those facts that are pertinent to this appeal.

The Star of Alexandria was owned by Caribene Investments, Ltd., a corporation organized under the laws of Gibraltar. Caribene had contracted with Palm Navigation, a company with offices in Greece, to manage the vessel. On February 28, 1989, less than two months before the Star of Alexandria sank, Caribene chartered the vessel to Carbotrade, an Italian corporation with its principal place of business in Italy. Carbotrade subchartered the vessel to Essex Cement Company, a New Jersey partnership and affiliate of third-party defendant Titan Cement Company, the owner of the cement cargo that went down with the Star of Alexandria.

After the vessel sank, Carbotrade sued BV. BV is a French classification society with its principal place of business in France and offices in ports throughout the world. A classification society sets standards for the quality and integrity of vessels and performs surveys to determine whether vessels are in compliance with the classification society's rules and regulations, national laws, and international conventions. If a vessel passes inspection, the classification society either issues a certificate attesting to the vessel's conformity with the

applicable rules, regulations, laws, and conventions or endorses an existing certificate with a visa reflecting the survey. If the vessel fails to pass the inspection, the classification society either does not issue the certificate or withdraws the existing certificate.

At least as far back as 1985, BV contracted with Caribene to survey the Star of Alexandria. Between March 6 and March 28, 1989, BV conducted several surveys of the Star of Alexandria: a survey to determine whether the vessel was in compliance with certain international conventions; a bottom survey to determine whether the vessel required dry docking; and an intermediate survey to determine the soundness of its interior compartments. After completing the surveys, BV issued certificates indicating that the Star of Alexandria was in compliance with the international conventions and endorsed the existing ship's classification certificate on the basis of the bottom and intermediate surveys.

Carbotrade claims that BV negligently performed the bottom and intermediate surveys and thus negligently endorsed the classification certificate. In particular, Carbotrade alleges that BV's surveyor, Konstantinos Stavropoulos, was negligent in failing to withdraw the classification certificate after he noticed that the vessel's wingtanks were leaking. Carbotrade claims that cracks in the wingtanks reduced the vessel's strength and contributed to the sinking of the Star of Alexandria. Carbotrade further argues that under BV's own rules and regulations, a new visa cannot be issued when the surveyor discovers cracks in the wingtanks. If the visa had not been issued, the Star of Alexandria's previous classification certificate would have lapsed, and the vessel would not have been "in class" for the period of the voyage.

Carbotrade maintains that it relied on BV's representation that the vessel was fit and suitable to carry cargo and that, if BV had refused to extend the hull certificate, Carbotrade would not have allowed the vessel to sail with the cargo on board. BV responds in its brief on appeal that its "Rules [do] not require that the vessel's wing tanks [ ] be absolutely

watertight for the vessel to pass the intermediate survey." In addition, BV notes that during March 1989, an independent surveyor hired by Essex also inspected and passed the vessel. The surveyor, Constantine Tsamados, saw some water leaking from the wingtanks, but noted that the wingtanks would not be used during the voyage and, thus, certified the vessel as suitable for the carriage of the cement cargo that was ultimately boarded. Carbotrade dismisses the significance of Tsamados's survey, claiming that the "purpose of [Tsamados'] survey was limited to establishing that the holds were clean, dry, and rust free, and not to assessing the seaworthiness of the vessel."

Because the Star of Alexandria was registered in Gibraltar, the United Kingdom Department of Transportation investigated the sinking. The department concluded that the vessel sank because it "was so overloaded and reduced in structural strength that, having experienced exceptionally stormy weather conditions crossing the Atlantic, [it] broke in two and sank." Carbotrade argues that BV's topside wingtank test was designed to detect the structural weakness that caused the ship to break in two.

Carbotrade first invoked arbitration, and obtained a default judgment, against Caribene in London pursuant to the arbitration clause in the head charter. Caribene has no known assets and the judgment has not been satisfied. Caribene's insurers have refused to satisfy this judgment because they claim that Caribene was in violation of Gibraltar's manning requirements.

In January 1995, BV moved for summary judgment in this action. BV argued that the law of the United Kingdom applied to the dispute and that under United Kingdom law, classification societies do not owe a duty to third parties. *See Marc Rich & Co. v. Bishop Rock Marine Co. (The Nicholas H)*, [1995] 3 All E. R. 307 (H.L.). BV argued further that, in any event, neither Carbotrade nor Essex (which had assigned its claim to Carbotrade) could establish that it had relied on BV's classification certificate. The district court, in an opinion and

order filed on October 19, 1995, held that United Kingdom law applies and granted summary judgment to BV. In addition, the district court found that even if United States law applied, BV did not owe a duty to Carbotrade. Finally, the district court agreed with BV that even if such a duty were owed, there was insufficient evidence that Carbotrade or Essex relied on the relevant classification certificates. Carbotrade now appeals.

DISCUSSION

Our review of a grant of a motion for summary judgment is de novo. *Schonholz v. Long Island Jewish Medical Ctr.*, 87 F.3d 72, 77 (2d Cir. 1996). A lower court must enter summary judgment in favor of the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment,

> [a] judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-movant] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Furthermore, a district judge must view the evidence in the light most favorable to the non-moving party and must draw all inferences in favor of that party. *See Sports Auth., Inc.* v. *Prime Hospitality Corp.*, 89 F.3d 955, 960 (2d Cir. 1996).

The first and foremost task before us on this appeal is to decide which country's law applies to Carbotrade's cause of action for negligent misrepresentation. The district court concluded that, under the maritime conflicts of law test first announced by the Supreme Court in *Lauritzen v. Larsen*, 345

U.S. 571 (1953), and subsequently elaborated in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970) (collectively, the "*Lauritzen* triad"), the law of the Star of Alexandria's flag should apply. Because the Star of Alexandria flew the flag of Gibraltar, the district court applied the law of the United Kingdom. The House of Lords has held that a third-party may not bring an action for negligent misrepresentation in connection with a classification certificate, *see Marc Rich & Co.*, [1995] 3 All E.R. at 332, and the district court therefore dismissed Carbotrade's cause of action.

Carbotrade argues that the district court should have applied the law of Greece, which, Carbotrade maintains, permits an injured third party to maintain a cause of action against a classification society for negligent misrepresentation. We agree with Carbotrade that Greek law controls, but, because the issue was not fully explored below, we remand to the district court to determine what duty, if any, Greek law imposes on BV.

The traditional choice of law doctrine in tort cases, and adopted by the First Restatement of Conflicts of Law, is the *lex loci delicti* rule, which emphasizes the place of the alleged wrongful act and is still followed in a few American states. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 Am. J. Comp. L. 599, 606 (1994). Virtually all American states have abandoned the traditional approach and the majority of them have adopted the interest analysis approach of the Second Restatement of Conflicts of Law or some other form of interest analysis. *Id.* at 609-12. The Second Restatement's approach, as with other forms of interest analysis, continues to attach importance to the place of the alleged wrongful act, but only as part of a broader test that determines which jurisdiction has the greatest interest in the dispute or the most substantial contacts with it. Although interest analysis has come under increasing attack by academics in recent years, *see* Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 278-79 & nn.1-7 (1990) (summarizing the criticisms),

courts continue to forgo the traditional approach, choosing instead to adopt some form of interest analysis, *see* Symeon C. Symeonides, *Choice of Law in the American Courts in 1994*, 43 Am. J. Comp. L. 1, 2-4 (1995) (noting that in 1994 three more states abandoned the traditional methodology and adopted that of the Second Restatement).

The Supreme Court, in the *Lauritzen* triad, similarly has rejected a strict *lex loci delicti* approach to resolving conflicts questions in maritime tort cases and has adopted an interest analysis that looks to: (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the domicile of the injured party; (4) the domicile of the shipowner; (5) the place of the contract;[1] (6) the inaccessibility of the foreign forum; (7) the law of the forum, and (8) the shipowner's base of operations. *See Rhoditis*, 398 U.S. at 309; *Lauritzen*, 345 U.S. at 583-92; *see also Romero*, 358 U.S. at 382 (noting that the *Lauritzen* test is not limited to Jones Act cases but is generally applicable to maritime tort actions). The weight to be given each factor varies from case to case and the list is not an exhaustive one. *Rhoditis*, 398 U.S. at 308-09.

The district court concluded that, in the circumstances of this case, the *Lauritzen* factors pointed "indiscriminately to much of the globe" and that therefore the law of the flag would govern in the absence "of proof that another nation has a more significant, countervailing interest." *Carbotrade*, 901 F. Supp. at 743 (quotation omitted). As we noted in *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1082 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1399 (1994), the Supreme Court in *Lauritzen* did "emphasize[ ] the importance of the law of the flag, which 'overhears most other connecting

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[1] The *Lauritzen* Court, in discussing the applicability of the place of the contract, noted that "the tendency of the law is to apply in contract matters the law which the parties intended to apply," 345 U.S. at 589 (footnote omitted), and in a case where the parties have made a choice of law in a contract between them, this fact might also be an appropriate additional factor to weigh. We do not reach this issue, however, because there is no contract between Carbotrade and BV.

events in determining applicable law.'" (quoting *Lauritzen*, 345 U.S. at 585). The *Lauritzen* Court noted that the strong considerations in favor of applying the law of the flag "must prevail unless some heavy counterweight appears." 345 U.S. at 586.

The law of the flag, however, is only one of several factors to be considered and in *Rhoditis* itself the Supreme Court applied United States law notwithstanding that the ship flew a Greek flag, the plaintiff was a Greek citizen, and his employment contract was signed in Greece. 398 U.S. at 308, 310. The Supreme Court in *Rhoditis* noted with approval our decision in *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 441 (2d Cir. 1959), in which we stated that the decision as to whether to apply United States law, specifically the Jones Act, to a particular tort claim by a seaman against his employer "involves the ascertainment of the facts or groups of facts which constitute contacts between the transaction involved in the case and the United States, and then deciding whether or not they are substantial." The *Rhoditis* Court rejected the law of the flag precisely because of "the substantial and continuing contacts that [the] owner has with this country." 398 U.S. at 310.

Although *Rhoditis* was a Jones Act case, we believe that nothing in the Court's opinion limits its application to such cases and *Rhoditis*'s emphasis on applying the law of the state with the most substantial contacts to the event giving rise to the claim applies to all maritime tort cases. *Lauritzen* itself was a Jones Act case, but the Supreme Court in *Romero* has stated plainly that the *Lauritzen* factors apply to all maritime tort cases. 358 U.S. at 382. Similarly, we can discern no reason wh *Rhoditis's* emphasis on choosing the law of the state with the most substantial and continuing contacts should be treated any differently, and it is with this in mind that we address the *Lauritzen* factors.

We first note that certain *Lauritzen* factors do not apply to the case before us. First, in contrast to *Lauritzen*, no direct contractual relationship exists between the plaintiff and the

defendant, so the fifth factor -- the place of the contract -- is not involved in our analysis. Also, *Lauritzen's* sixth factor the accessibility of the foreign forum -- is irrelevant. As *Lauritzen* itself notes, this factor is more pertinent to a forum non conveniens test than to a choice of law test, and the *Lauritzen* Court included it as a factor to be weighed in favor of applying the Jones Act where the compensation scheme of another country only would permit suit in its own courts or when the plaintiff is present in that country. 345 U.S. at 589-90. In this case there is no bar to the district court applying either United Kingdom or Greek law, and neither forum would require the plaintiff to be present there to institute suit. Finally, the seventh *Lauritzen* factor -- the law of the forum -- is irrelevant here because this litigation is in the courts of the United States. *See also* Jack L. Allbritton, *Choice of Law in a Maritime Personal Injury Setting*, 43 La. L. Rev. 879, 883 (1983) (noting that *Lauritzen* assigned little weight to inaccessibility and law of the forum); Michael Boydston, Note, *Cruz v. Chesapeake Shipping and the Choice-of-Law Problem in Admiralty Actions*, 27 Tex. Int'l L.J. 419, 439-40 (1992) (noting that all three factors -- place of contracting, inaccessibility of the foreign forum, and law of the forum -- serve no useful purpose and have been denigrated).

We also believe that the domicile and base of operation factors must be adjusted to the particular facts of this case. Unlike the typical Jones Act case, which involves a plaintiff seaman and a defendant shipowner, this case involves three different parties: (1) a plaintiff who chartered the vessel, (2) a defendant classification society, and (3) the shipowner, which actually contracted for the services of the classification society but is not a party to this action. The domiciles of the plaintiff and the defendant plainly are relevant here. Furthermore, we believe that the domicile of the shipowner continues to be relevant, not only because it is expressly mentioned in *Lauritzen*, but because it is the shipowner who was in privity of contract with BV. And just as *Rhoditis* found the shipowner's base of operations, in addition to its domicile, to be important under the *Lauritzen* test, 398 U.S. at 309, we

believe the base of operations of all three parties, and not simply their domicile, to be relevant to our consideration.

To summarize, we believe that five *Lauritzen* factors are relevant to our determination of the proper law to apply in this case: (1) the place of the alleged wrongful act, (2) the law of the ship's flag, (3) the domicile and base of operations of the plaintiff, (4) the domicile and base of operations of the defendant, and (5) the domicile and base of operations of the shipowner. we believe that in the circumstances of this case these factors, taken together, favor the application of Greek law.

The first factor -- the place of the wrongful act -- plainly favors the application of Greek law: BV is alleged to have issued negligently the defective classification certificates in Greece. The fourth factor -- the domicile and base of operations of BV also supports the application of Greek law. BV is a French corporation and is therefore domiciled in France.[2] However, it maintains one of its many permanent offices in Piraeus, Greece. The presence of an office of a defendant in a particular country might not always be sufficient to tip this factor in favor of applying the law of that country. But unlike the typical Jones Act case, wherein a seaman is injured aboard a vessel and the place of the tort is often happenstance, BV's conduct was out of an office in a country where BV had chosen to establish itself and thereby become subject to that country's laws. *Cf. Rhoditis,* 398 U.S. at 310 (looking to the real nature of the operations). Because it is the actions of employees of BV's Greek office that give rise to the instant dispute, we believe that this factor weighs heavily in favor of applying Greek law over that of the United Kingdom. *Cf.* Restatement (Second) of Conflicts of Law 145(2)(c) (1971)

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[2] In actuality, a corporation does not have domicile but instead has citizenship. *See Moore v. General Motors Pension Plans*, No. 95-3133, 1996 WL 421765 at *1 (7th Cir. Mar. 8, 1996) (per curiam). Citizenship, in turn, is based on the place of incorporation and, at least for the purposes of diversity jurisdiction, the principal place of the corporation's business. *Id.*

(noting that the place of business of the parties is relevant in choosing which tort law to apply).

Furthermore, the fifth factor -- the domicile and base of operations of the shipowner -- favors the application of Greek law. Although the nominal shipowner, Caribene, was a Gibraltar corporation, there is little doubt that Caribene was simply a shell corporation.[3] The actual owners of the Star. of Alexandria, as distinguished from its paper owner, were Greek. Both of Caribene's directors are Greek residents, and Palm Navigation, the company that operated the Star of Alexandria, is located in Greece.[4] Therefore, the fifth *Lauritzen* factor weighs in favor of applying Greek law.

The third factor, which looks to the domicile and base of operations of the plaintiff, favors the application of neither Greek nor United Kingdom law, nor one over the other. No one disputes that Carbotrade is an Italian corporation with its principal place of business in Italy. Furthermore, Carbotrade's assignor (Essex Cement) is a New Jersey partnership with its principal place of business in New Jersey.

Finally, the Star of Alexandria sailed under the flag of the United Kingdom, a fact that ordinarily would point to the application of the law of that country. Carbotrade repeats its argument that the Star of Alexandria flew the United Kingdom's flag simply as a flag of convenience and that, thus, this factor should be ignored. The district court rejected this argument, stating that "Carbotrade has failed to offer any evidence that the shipowner selected a flag in order to avoid

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[3] Although BV disputes this, it presents no evidence that Caribene was anything other than a shell corporation and instead only takes exception to Carbotrade's reliance on Caribene's Annual Return for 1989 because it is dated four days after the sinking of the Star of Alexandria. We see no relevance to the four day gap in time and note that the return amply supports Carbotrade's position.

[4] Palm Navigation was either a Liberian or a Panamanian company; even its general manager, Athanasios Zachariades, could not remember which. However, Palm Navigation's offices seem to have been located in Greece.

application of the laws of more stringent countries." *Carbotrade*, 901 F. Supp. at 744. We disagree with the district court's finding that Carbotrade submitted no evidence to this effect. Carbotrade put in evidence demonstrating that Palm Navigation, which had the responsibility of selecting the Star of Alexandria's flag, was not sure that the vessel always flew under the flag of Gibraltar and that Palm Navigation would have changed the Star of Alexandria's flag if the vessel had been required to comply with United Kingdom law for the manning of vessels.

We need not decide, however, whether the Star of Alexandria did indeed sail under a flag of convenience, because, even assuming that the district court was correct on this issue, we find that the factors favoring the application of Greek law greatly outweigh this factor. The fact that the allegedly tortious act was committed in Greece, as well as the presence of BV, the vessel's owners, and the vessel's operating company in that country, give Greece considerably more substantial contacts than the United Kingdom with this dispute. Therefore, we believe, that Greek law should apply.

BV contends that we nonetheless should favor the law of the flag in order to create certainty as to which laws apply to claims against classification societies. We disagree. Whatever significance law of the flag may have in cases where the ship or its owner is a party and where other factors fail to point clearly to another jurisdiction's law, we see no reason to apply the law of the flag here in preference to that of another jurisdiction whose ties are more pertinent to the dispute, especially given the fact that neither the ship nor the owner is a party.

Carbotrade contends that under Greek law, BV's duty not to engage in negligent misrepresentations extended to Carbotrade. In the district court, Carbotrade submitted a single affidavit from a Greek lawyer, which stated in conclusory fashion that Greek law creates such a duty; the affidavit did not state specifically that Greek law would create a duty from defendants to third parties for negligent misrepresentations under

these circumstances. *Cf. Marc Rich & Co.*, [1995] 3 All E.R. at 322 (noting that even owners of vessels apparently have never successfully sued a classification society for damages). BV has not yet submitted any proof as to what duty Greek law may or may not impose under these facts. Because we remain uncertain as to what Greek law may require, we decline at this stage to interpret Greek law as Carbotrade would have us do. In these circumstances, we think the preferable course is to remand this case to the district court to determine in the first instance the parameters of Greek law as they apply to this case.

Finally, we note that the district court erred in concluding that Carbotrade could not, as a matter of law, establish reliance on BV's representations. The district court reasoned that Carbotrade was aware of the leakage in the wingtanks -- because Tsamados, Carbotrade's surveyor, was aware of it -- and had ample opportunity to refuse the vessel under both the charter and the subcharter. *Carbotrade*, 901 F. Supp. at 749. Carbotrade, however, has alleged that although Tsamados was aware of the leakage, he was not aware that this leakage indicated that one Star of Alexandria was not seaworthy. There was evidence that Tsamados's responsibility was only to ensure that the cargo holds were watertight and dry, and he testified that he relied upon BV's survey to ensure that the vessel was seaworthy. We believe that there is sufficient evidence such that a reasonable trier of fact could find that Carbotrade relied on Bureau Veritas's representations.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court, and we remand for further proceedings consistent with this opinion.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

The majority today abandons "the most venerable and niversal rule of maritime law[,] . . which gives cardinal importance to the law of the flag," *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953), in choice of law questions arising out of maritime torts. I would apply the law of the flag to the instant case and affirm the judgment of the district court.

On April 17, 1989, the M/V STAR OF ALEXANDRIA sank while en route to the United States from Greece. The ship was owned by Caribene Investments, Ltd. ("Caribene"), a corporation organized under the laws of Gibraltar, a dependency of the United Kingdom ("U.K."). The ship was registered in Gibraltar and flew under a British flag. Under the authority of the Government of Gibraltar, the ship was surveyed for safety construction, safety equipment, load line, radiotelegraphy and pollution prevention, and received appropriate certificates of approval, all of which were issued in London. It also was subject to strict British manning laws, including the requirement that at least one British officer be on board at all times. Its failure to comply with this requirement ultimately led its insurer to deny coverage for cargo losses sustained as a result of the ship's sinking. Moreover, the charter party between Caribene and plaintiff, Carbotrade SpA ("Carbotrade"), called for disputes to be arbitrated in London. Finally, the accident was investigated by the U.K. Department of Transportation. Despite these extensive contacts between the STAR OF ALEXANDRIA and the U.K.. particularly the flying of the U.K. flag, my colleagues conclude that Greek law, rather than U.K. law, governs this dispute. I disagree.

In *Lauritzen*, a case arising under the Jones Act, 46 U.S.C. § 688, the Supreme Court enumerated seven factors that courts generally look to in resolving maritime choice of law questions: (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; and (7) the

law of the forum. 345 U.S. at 583-92. The Court later added an eighth consideration, namely the shipowner's base of operations. *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970). This list is not exhaustive, and the factors are not necessarily accorded equal weight. *Id.* at 308-09. However, overarching concerns of comity, pragmatism and predictability led the *Lauritzen* Court to declare that "the weight given to the ensign overhears most other connecting events in determining applicable law." 345 U.S. at 585. Accordingly, the law of the flag should apply "unless some heavy counterweight appears." *Id.* at 586; *see also Tjonaman v. A/S Glittre*, 340 F.2d 290, 292 (2d Cir.) ("[T]he starting point for weighing and evaluating of factors is consideration of [the law of the flag]."), *cert. denied*, 381 U.S. 92S (196S). The district court, in my opinion, properly applied this principle.

The travels and travails of the STAR OF ALEXANDRIA were truly international in character. In addition to the substantial British contacts present here, the *Lauritzen* factors suggest that ther nations also share an interest in this litigation. The defendant, Bureau Veritas ("B.V."), is a French corporation with its principal place of business in France. The plaintiff, Carbotrade, is an Italian corporation. Its assignor, Essex Cement, is a New Jersey partnership, and the suit was brought in a United States court. Finally, the vessel sank in international waters. In the light of these facts, the district court concluded that "the *Lauritzen* factors 'point indiscriminately to much of the globe.'" *Carbotrade SpA v. Bureau Veritas*, 901 F. Supp. 737, 743 (S.D.N.Y. 1995) (quoting *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1082 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1399 (1994)). It is precisely in these circumstances that the law of the flag takes on particular significance because "it is a unifying factor that can govern the potential liabilities of a classification society to third parties with whom the society has no direct contractual relations." *Id.* at 744.

At the outset, it is pertinent to note that in the district court Carbotrade argued principally for the application of United States law and only "halfheartedly" argued in the alternative

that Greek law should govern. *Id.* My colleagues now insist, however, that the place of the wrongful act plainly favors the application of Greek law. *Ante* at 14. This statement finds support in neither the facts nor the law. "The place of the wrongful act is accorded little weight in traditional maritime cases, in which the locality of the ship changes constantly." *Fogleman v. ARAMCO (Arabian Am. Oil Co.)*, 920 F.2d 278, 282 (5th Cir. 1991); *Cruz v. Maritime Co. of Philippines*, 549 F. Supp. 285, 288 (S.D.N.Y. 1982), *aff'd*, 702 F.2d 47 (2d Cir. 1983). Moreover, my colleagues do not fix correctly the location of the wrongful act. At issue here is a claim of negligent misrepresentation. "In order to state a cause of action for negligent misrepresentations, the plaintiff must allege that: (1) the defendant, in the course of his profession, supplied false information for the plaintiff's guidance in a business transaction; (2) the defendant failed to exercise reasonable care in gathering the information; (3) the plaintiff relied on the information in a transaction the defendant intended it to influence; and (4) the plaintiff thereby suffered pecuniary loss." *Grass v. Credito Mexicano, S.A.*, 797 F.2d 220, 223 (5th Cir. 1986), *cert. denied*, 490 U.S. 934 (1987); *see* 1 *New York Pattern Jury Instructions - Civil* § 2:230 (2d ed. 1974).

The law is clear that in a tort action such as this, an actionable wrong does not come into being absent the above-quoted item 4, proof of damage or loss. *See*

> *Sack v. Low*, 478 F.2d 360, 365 (2d Cir. 1973) (cause of action for fraud does not arise until loss is suffered);
>
> *Santana, Inc. v. Levi Strauss & Co.*, 674 F.2d 269, 272 (4th Cir. 1982) (injury is last element of a tort);
>
> *Ritchie Enters. v. Honeywell Bull, Inc.*, 730 F. Supp. 1041, 1046 (D. Kan. 1990) (place where injury suffered generally considered to be where wrong occurred).

"'[I]n actions of negligence damage is of the very gist and essence of the plaintiff's cause.'" *Schmidt v. Merchants*

Despatch Transp. Co., 270 N.Y. 287, 300 (1936) (quoting *Comstock v. Wilson*, 257 N.Y. 231, 235 (1931)). I therefore disagree with the majority holding that the tort upon which Carbotrade bases its claim occurred in Greece. To paraphrase a statement of the New York Court of Appeals in *Martin v. Julius Dierck Eguip. Co.*, 43 N.Y.2d 583, 591 (1978), Carbotrade's assignor "possessed no cause of action . . . any where in the world until [it] was injured in [international waters, 2000 miles west of Greece]." The tort at issue herein occurred on the high seas, not in Greece.

I am equally at odds with the majority's assertion that "[t]he actual owners of the STAR OF ALEXANDRIA, as distinguished from its paper owner, were Greek." *Ante* at 15. In the complaint that initiated this litigation, Caribene was described as "owner of the 'M/V STAR OF ALEXANDRIA.'" When B.V. moved to dismiss the complaint, Carbotrade's attorney submitted an affidavit in which he described Caribene as "at all material times, a corporation organized and existing by virtue of the laws of the Dependency of Gibraltar and was the registered owner of the M.V. 'STAR OF ALEXANDRIA.'" The chief legal officer of B.V. filed an affidavit in support of B.V.'s motion to dismiss in which he stated that B.V. contracted to class the STAR OF ALEXANDRIA with Caribene, "the vessel's owner." These statements never were challenged. If share ownership is determinative of corporate citizenship, Greece is conspicuous by its absence. Caribene's 1989 Annual Return showed that it had 400 shares of stock outstanding, one of which was held by Gateway Nominees Ltd., 123 Main Street, Gibraltar, and the remaining 399 by Marissa Investment Trust Inc., 80 Broad Street, Monrovia, Liberia.

In separate orders, District Judges Patterson and Koeltl described Caribene, a corporation organized under the laws of Gibraltar, as the ship's owner, Judge Patterson in an unpublished opinion and Judge Koeltl at 901 F. Supp. at 744. In sum, I suggest that the majority errs, both legally and factually, in its assertion that the STAR OF ALEXANDRIA's

"actual owners," whom my colleagues have not identified, were Greek.

I am concerned about the facility with which my colleagues "pierce the veil" of Caribene's corporate existence. My colleagues, assertion that Caribene "was simply a shell corporation," *ante* at 15, is strong language. A shell corporation is a "corporate frame, containing few, if any, assets, kept alive by required filings, generally for future use." *Black's Law Dictionary* 343 (6th ed. 1990); *see also* 8A Am. Jur. 2d *Corporations* § 738, at 649. Until the STAR OF ALEXANDRIA foundered on April 17, 1989, Caribene was its owner. To say that this large, 600 foot, ocean-going cargo vessel of 22,627 gross tonnage with an insured value of $3 million and a chartering rate of $7,800 per day was not a substantial asset would be to blink reality.

My colleagues' discussion of the "flag of convenience" doctrine, and particularly its possible application to Gibraltar, is both unnecessary and unfounded. According to Athanasios Zachariades, the chief officer of Palm Navigation, which managed the STAR OF ALEXANDRIA, Palm was located in either Liberia or Panama, and none of its shareholders was Greek. The majority cites Zachariades' testimony to the effect that, if the STAR OF ALEXANDRIA had been required to comply with U.K. law for the manning of vessels, he would have changed the ship's flag. *Ante* at 16. The fact is that the vessel did not comply fully with U.K. law, and it is that very lack of compliance that led to this litigation. That, subsequent to the events herein, Palm Navigation may have hoisted other nations, flags above its managed ships to benefit from more lenient maritime laws only reinforces the conclusion that sailing under the U.K. flag was not done for evasive purposes.

"Ships . . . register in flag of convenience countries because those countries subject them to little or no control. Fees and taxes are low, labor regulations and safety standards are minimal, and ship movements are largely unhampered." *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 160 (2d Cir.) (en banc) (Van Graafeiland, J., dissenting), *cert. denied*,

449 U.S. 890 (1980); *see Jose v. M/V Fir Grove*, 801 F. Supp. 358, 363 (D. Or. 1992). A paradigmatic example of such a country is Liberia, home of Marissa Investment Trust Inc. If that company wanted Caribene to operate under a flag of convenience, it does not make sense that it would have left Liberia, whose name is synonymous with "flag of convenience." and incorporated in the United Kingdom. There is nothing in the record to show that Gibraltar, an arm of the United Kingdom, is a flag of convenience country.

This Court recently reaffirmed the preeminence of the law of the flag in *Sundance*, *supra*, a case factually similar to the one at bar. In *Sundance*, plaintiffs were the owners of a Bahamian flag ship which sank off the coast of British Columbia. They sued the classification society which had issued certificates representing the vessel's compliance with international safety standards as well as its own classification rules. Under Bahamian law, the defendants were entitled to immunity in connection with their issuance of certain of the certificates. The district court noted that factors other than the flag pointed toward many nations and held that, under those circumstances, Bahamian law applied. We affirmed, reemphasizing "the importance of the law of the flag, which 'overbears most other connecting events in determining applicable law.'" 7 F.3d at 1082 (quoting *Lauritzen*, 345 U.S. at 585). This reasoning is clearly applicable in the instant case.

CONCLUSION

The STAR OF ALEXANDRIA was entered in the United Kingdom Protection and Indemnity Association, a mutual protection and indemnity club with an office in London, England. That company denied coverage for all claims arising out of the STAR OF ALEXANDRIA's sinking because of Caribene's failure to comply with the manning requirements of Gibraltar. Thus, the law of the flag already has played a substantial role in the events at issue herein. My colleagues suggest no persuasive reason why the law of Gibraltar should be supplanted now by the law of Greece.

I would affirm.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CARBOTRADE SpA, on its own behalf and as an assignee of Essex Cement Co.,

Plaintiff,

- against -

BUREAU VERITAS,

Defendant.

92 Civ. 1459 (JGK)
OPINION AND ORDER

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BUREAU VERITAS,

Third-Party Plaintiff,

- against -

TITAN CEMENT COMPANY, S.A.,

Third-Party Defendant.

----------X

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John G. Koeltl, U.S.D.J.:

This admiralty action arises from the loss of cargo that occurred when the vessel M/V "STAR OF ALEXANDRIA" ("STAR OF ALEXANDRIA" or the "vessel") sank during its April 1989 voyage across the Atlantic. The plaintiff Carbotrade SpA ("Carbotrade"), who had chartered the vessel from her owners, brings this action on its own behalf and as an assignee of Essex Cement Co. ("Essex"), the subcharterer of the vessel and owner of her cargo, seeking damages for the cargo lost as a result of the sinking. The plaintiff alleges that the defendant and third-party plaintiff Bureau Veritas ("B.V."), a classification society, is liable for this loss because B.V. negligently endorsed the vessel's certificate of classification. The plaintiff contends that B.V. failed to detect or failed to act upon perceivable defects in the vessel, and that this failure was the proximate cause of the vessel's sinking. B.V. now moves for summary judgment pursuant to Fed. R. Civ. P. 56(c) on the basis that it owed no legal duty to the plaintiff, and that even if B.V. did have such a duty, the plaintiff neither actually nor reasonably relied on B.V.'s classification of the vessel. For the reasons explained below, the defendant's motion is granted.

I.

The STAR OF ALEXANDRIA was a British flag bulk carrier registered in the United Kingdom ("U.K.") dependency of Gibraltar. Kende Aff., Exh. 13 (Certificate of British Registry). The vessel broke in two amidships and sank on April 17, 1989 in international waters while on a voyage from Eleusius, Greece, to Newark, New Jersey. Its owner was

Caribene Investments, Ltd. ("Caribene"), a corporation organized under the laws of Gibraltar. *Id.*; Exh. 2 (Tisdale 5/26/92 Aff.) at ¶ 6. Pursuant to a charter dated February 28, 1989 ("head charter"), Caribene chartered the STAR OF ALEXANDRIA to the plaintiff Carbotrade, an Italian corporation with its principle place of business in Italy. Tisdale Aff., Exh. 10 ("head charter"); Kende Aff., Exh. I (First Amended Complaint) at ¶ 2. On the same day, Carbotrade subcha:rtered the vessel to Essex, a New Jersey partnership and affiliate of the third-party defendant Titan Cement Company ("Titan"), a Greek corporation and owner of the cement cargo aboard the STAR OF ALEXANDRIA when it sank. Tisdale Aff., Exh. 7 (voyage subcharter); Tisdale Aff., Exh. 1 (Tsanglis Dep.); Kende Aff., Exh. 22 (Essex-Titan Term Cement Supply Agreement); Kende Aff., Exh. 25 (Bill of Lading). Essex is not a party to this action. Carbotrade's insurer, The Standard of London, has settled with Essex for $1.25 million and currently owns Essex's claim to causes of action to recover damages for the lost cargo. Kende Aff., Exh. 38A (Ravano Dep.). Essex is to receive a portion of any recovery Carbotrade obtains from any third-party actions connected to the sinking of the STAR OF ALEXANDRIA. Kende Aff., Exh. 29 (settlement, release, and assignment agreement between Carbotrade and Essex).

In this action, Carbotrade sues the classification society Bureau Veritas ("B.V."), a French corporation with its principal place of business in France and offices in ports throughout the world, including New York. Kende Aff., Exh. 6 (Godefroi Decl.) at ¶¶ 2, 4. B.V. promulgates standards for the quality and integrity of ocean-going vessels to determine their conformity with B.V.'s published standards by "classing" vessels in accordance with its rules. *Id.* at ¶ 3. All of B.V.'s agreements to class a vessel are entered into with the vessel's owner and are approved by personnel in B.V.'s headquarters in Courbevoie, France. *Id.* at 4. B.V. classes vessels for terms of three to five years, depending upon the vessel's age. Tisdale Aff., Exh. 18 (B.V.'s "Rules and Regulations for the Classification of Steel Ships 1988"), Art. 2-12.1. During the term, B.V. conducts surveys "for the maintenance, renewal or

confirmation of their class." *Id.*, Art. 2-11.1. After a survey, the B.V. surveyor issues a classification certificate or endorses the classification certificate with a visa reflecting the survey. *Id.*, Art. 2-11.1. The certificate and visas represent "the only authentic information about the class of the ship; they may be made available by the Owner to all interested parties." *Id.*, Art. 2-11.1. In addition, a ship's classification is valid only if the vessel is "loaded and operated in a proper manner by competent and qualified crew or operating personnel according to the environmental, loading operating and other criteria on which classification is based." *Id.*, Art. 1-12.2.23. Here, the STAR OF ALEXANDRIA, a Gibraltar-registered vessel, was subject to U.K. manning laws. Kende Aff., Exh. 28 (Holmes Decl.) at ¶¶ 7-11.

Under the head charter, the owner of the STAR OF ALEXANDRIA warranted to the plaintiff that the owner would maintain the vessel in class. Tisdale Aff., Exh. 10. B.V. was not a party to this charter. The charter also provided that Carbotrade's surveyor and master would conduct an on-hire survey "for the purpose of ascertaining the vessel's condition," and that "[b]efore Notice of Readiness is tendered at loading port, the vessel is to be inspected and passed by Charterer's surveyor." *Id.*[1] The charterer had the option of cancelling the charter up to the day of the vessel's readiness. *Id.* If anything prevented "the full working of the vessel," Carbotrade could cease paying the daily hire for the vessel until the situation was corrected. *Id.* In addition, the charter provided that any dispute between Caribene and Carbotrade would be settled through arbitration in London. *Id.*

Unlike the head charter, the subcharter between Carbotrade and Essex contained no express provision that the owner would maintain the vessel's class. *See* Tisdale Aff., Exh. 2

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[1] A Notice of Readiness is a document given by the ship's master to the shippers advising them that the vessel is ready to receive cargo. Kende Aff., Exh. 33 [Eleftheriou Dep.]. This document indicates that "the vessel is in all respects ready to load cargo as per the charter party." *Id.*

(Fjeldberg Dep.) (noting that subcharter does not mention vessel's classification). The plaintiff contends, however, that one of the clauses of the subcharter, which stated that the ship was "warranted tight, staunch, and strong, and in every way fitted for the voyage," implied a guarantee that the ship would be in class. Tisdale Aff., Exh. 7; Exh. 2 (Fjeldberg Dep.). Like the head charter, the subcharter required that before the Notice of Readiness to load cargo was tendered, the vessel was to be inspected and passed by the charterer's surveyor. Tisdale Aff., Exh. 7. This surveyor could fail the vessel for inspection if he found repairs were necessary, and if the vessel did not pass inspection within 48 hours of the surveyor's first inspection, the charterers had the option to cancel the charter party. Tisdale Aff., Exh. 7; Kende Aff., Exh. 34 (Fjeldberg Dep.). In addition, the subcharter provided that any disputes between Carbotrade and Essex would be settled through arbitration in New York. Tisdale Aff., Exh. 7.

Beginning in 1985, B.V. conducted various surveys of the STAR OF ALEXANDRIA. Kende Aff., Exh. 10 (classification certificates); Exh. 6 (Godefroi Decl.) at ¶ 8. The last inspection of the ship before it sank took place from March 6, 1989 to March 28, 1989. Kende Aff., Exh. 6 (Godefroi Decl.) at ¶ 8. At this time, B.V. issued two certificates required by international convention: a loadline certificate, which concerns the method of loading cargo, and a safety equipment certificate. *Id.;* Kende Aff., Exh. 10 (classification certificates). In addition, B.V. performed other surveys, including a bottom survey, which is an inspection of the ship's hull in dry dock, and an intermediate survey, which is an internal examination of compartments in the interior of the ship. Kende Aff., Exh. 6 (Godefroi Decl.) at ¶ 9; Kende Aff., Exh. 10 (hull certificate, Visa No. 7); Tisdale Aff., Exh. 11 (Stavropoulos Dep.); Tisdale Aff., Exh. 18, Art. 2-41 (outlining procedures for bottom surveys), Art. 2-44 (intermediate surveys). The plaintiff alleges that B.V. negligently endorsed the ship's classification on the basis of the intermediate and bottom surveys.

An inspection of the ship's hull while in dry dock was not possible in March 1989. In a prior inspection, B.V. had deferred the vessel's dry-docking for the bottom survey until March 1989, and this extension was due to expire on March 20, 1989. Kendej Aff., Exh. 10 (hull certificate). However, because a tug strike prevented the STAR OF ALEXANDRIA from proceeding to dry dock, B.V. performed an in-water survey of the vessel's bottom instead, and on the basis of this test postponed the full bottom survey once again. Tisdale Aff., Exh. 11 (Stavropoulos Dep.); Kende Aff., Exh. 37 (Osko Dep.); Kende Aff., Exh. 19 (survey report); Tisdale Aff., Exh. 18, Art. 2-14.2.24, 2-41.2 (in-water surveys). The plaintiff alleges that B.V. improperly extended the deadline for dry-docking because it failed to take certain measurements of the propeller shaft and because the inspection was conducted in cloudy water. Tisdale Aff., Exh. 13 (underwater inspection report); Exh. 11 (Stavropoulos Dep.); Exh. 18, Art. 2-41.2.22 (providing that during an in-water survey, "the in-water visibility is to be good"), Art. 2-4.3 (listing specific requirements for in-water surveys).

The plaintiff alleges that the proximate cause of the vessel's sinking was the negligent inspection of the vessel's top-side wing tanks during the intermediate survey of the ship. As the B.V. rules for intermediate surveys provide, Mr. Stavropoulos, the B.V. Senior surveyor of the STAR OF ALEXANDRIA, visually inspected and tested all of the vessel's top side wing tanks. Kende Aff., Exh. 19 (survey report); Kende Aff., Exh. 39 (Stavropoulos Dep.); Tisdale Aff, Exh. 18, Art. 2-44.1.11 (an intermediate surveyor must investigate, among other things, "one or several cargo holds, ballast tanks or other compartments, as deemed necessary by the Surveyor"); Tisdale Aff., Exh. 18, Art. 2-44.2.22 (in an intermediate survey, the ballast tanks to be surveyed "should include at least two top wing tanks") . In testing the wing tanks, Stavropoulos noticed some minor leakage. Kende Aff., Exh. 39 (Stavropoulos Dep.) Despite this leakage, Stavropoulos passed the tanks as satisfactory on March 28, 1989, thereby permitting the vessel to remain in class. Tisdale Aff., Exh. 11 (Stavropoulos Dep.); Kende Aff., Exh. 10 (hull certificate,

Visa No. 8). The plaintiff alleges that under B.V. rules, there is an implicit understanding that if there is any leakage from these tanks, a vessel will not be certified. *See* Tisdale Aff., Exh. 19 (Pennaneach Dep.) The plaintiff contends that cracks in the wing tanks reduced the vessel's structural strength and thereby contributed to the sinking of the ship. Tisdale Aff., Exh. 32 (Couling Dep.).

During March 1989, an independent surveyor hired byEssex also inspected the vessel. The surveyor, Constantine Tsamados, boarded the ship to conduct this survey four times: March 18, March 21, March 23, and a fourth time between the commencement of the loading and its completion. Kende Aff., Exh. 40 (Tsamados Dep.). Under the terms of the subcharter, the surveyor could fail the vessel for inspection if he found repairs were necessary. Kende Aff., Exh. 34 (Fjeldberg) Like the B.V. surveyor Stavropoulos, Tsamados observed some water leaking from the wing tanks, but noted in his report that they would not be used during the voyage. Kende Aff., Exh. 21 (Tsamados survey report). He certified the vessel as "passed" for carriage of the cement cargo that was ultimately loaded on board. Tisdale Aff., Exh. 26 (Tsamados certificate).

The plaintiff alleges the classification certificate together with the visa from the periodic survey was on board the vessel on March 28, 1995, and that Mr. Tsamados inspected this certificate when surveying the vessel in order to confirm that the certificate had been extended. Tisdale Aff., Exh. 25 (Tsamados Aff.) at ¶ 2; Kende Aff., Exh. 21 (Tsamados survey report) (noting the validity of the classification certificate). The plaintiff concedes, however, that there was never any direct correspondence or communication between the defendant B.V. and Carbotrade or Essex regarding the STAR OF ALEXANDRIA.

In addition, it is undisputed that the Notice of Readiness was issued by the ship's master and accepted by the cargo interests on March 21, 1989, several days before the independent surveyor completed his inspection of the vessel. Kende

Aff., Exh. 33 (Eleftheriou Dep.). Loading operations began on March 23, 1989, five days before B.V. renewed the vessel's classification; by March 28, 32,000 of the 33,389 tons of cargo had been loaded onto the vessel. Kende Aff., Exh. 33 (Eleftheriou Dep.); Exh. 25 (Bill of Lading).

The vessel never reached its final destination and sank on April 17, 1989 in international waters. The crew members were rescued by the U.S. Coast Guard and were brought to Boston, Massachusetts. Kende Aff., Exh. 26 (B.V.'s casualty report). The United Kingdom Department of Transportation ("DOT") investigated the sinking and concluded that it was caused by the negligence of the owners and crew, improper loading of the cargo, and exceptionally stormy weather conditions. Tisdale Aff., Exh. 9 (DOT report). B.V. representatives from Britain, France, and Greece cooperated with this investigation, but no representatives from the United States were involved. Kende Aff., Exh. 6 (Godefroi Decl.) at ¶ 12.

Pursuant to the arbitration clause contained in the head charter, Carbotrade commenced arbitration against Caribene in London and obtained a default judgment against the shipowner. Kende Aff., Exh. 2 (Tisdale 6/26/95 Aff.) at ¶ 18. This judgment has not been satisfied. *Id.* at ¶ 19. Caribene's insurers refuse to satisfy the judgment because the owners allegedly violated manning requirements of Gibraltar, the flag state. *Id.* Thus, Caribene has no known assets, and there is no insurance to compensate Carbotrade on its claims.

In this action, Carbotrade alleges that B.V. is liable for the cargo loss because B.V. breached its duty to Carbotrade by negligently allowing the vessel to remain in class even though it was not seaworthy. Carbotrade claims that B.V. improperly inspected the vessel's wing tanks, and that Carbotrade relied on B.V.'s representation that the vessel was fit and suitable to carry the cargo. Carbotrade alleges that had B.V. refused to extend the hull certificate on March 28, 1989, then neither Carbotrade nor Essex would have allowed the vessel to sail with the cargo aboard. In response, B.V. contends that as a matter of law it owed no duty to the plaintiff, and that even if

it did have such a duty, the plaintiff has failed to prove that it actually and reasonably relied on B.V.'s representations that the vessel was in class.

II.

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Gallo v. Prudential Residential Servs. Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *see also* Gallo, 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. *See Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

III.

As a threshold matter, the Court must determine which law governs this case. The defendant asserts that British law applies, while the plaintiff alleges that the controlling law is either the federal maritime common law of the United States or, in the alternative, Greek law.[2]

Federal choice of law principles determine the applicable law in maritime actions. *Romero v. International Terminal*

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[2] For purposes of the prior motion to dismiss that Judge Patterson denied, the parties agreed to assume that United States law applied. *Carbotrade SpA v. Bureau Veritas*, No. 92-1459, 1992 WL 367122, * 7 n.3 (S.D.N.Y. Nov. 20, 1992).

Operating Co., 358 U.S. 354, 382-83 (1959); *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1081-82 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1395 (1994). In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the Supreme Court held that conflicts between competing laws should be determined by "ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved." *Id.* at 582; *see also Romero*, 58 U.S. at 383 (in applying general federal maritime choice of law principles, "[t]he controlling considerations are the interacting interests of the United States and of foreign countries). The *Lauritzen* Court determined that the following factors are relevant for such a determination: (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the domicile of the injured party; (4) the domicile of the shipowner; (5) the place of contract; (6) the inaccessibility of the foreign forum; and (7) the law of the forum. 345 U.S. at 583-92; *Sundance*, 7 F.3d at 1081.[3] In *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), the Court noted that "the list of seven factors in *Lauritzen* was not intended as exhaustive," 398 U.S. at 309, and added the shipowner's base of operations as another relevant consideration.

Of all the relevant criteria, the application of the law of the flag to maritime causes of action is "[p]erhaps the most venerable and universal rule of maritime law." *Lauritzen*, 345 U.S. at 584; *see also Hellenic Lines*, 398 U.S. at 308 ("the flag that a ship flies may, at times, alone be sufficient"); *Sundance*, 7 F.3d at 1082 (noting that the law of the flag "'overbears most other connecting events in determining applicable law'") (quoting *Lauritzen*, 345 U.S. at 585). However, the law of the flag is given little weight when it is merely a flag of convenience. *See Lauritzen*, 345 U.S. at 587 (flag law not as relevant when shipowner's choice of flag appears to be an attempt to avoid stringent shipping laws);

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[3] Although *Lauritzen* was a Jones Act case, the Court has since held that the *Lauritzen* factors also govern the applicability of general maritime law in tort actions. *See Romero*, 358 U.S. at 382; *Sundance*, 7 F.3d at 1082.

Sundance, 7 F.3d at 1082 (noting that it would be inappropriate to apply the law of the flag when the flag country appears to be a sham). As the Court cautioned in *Hellenic Lines*, 398 U.S. 306, "[t]he Lauritzen test . . . is not a mechanical one. . . . The significance of one or more factors must be considered in light of the national interest served by the assertion of [that n.ation's law]." *Id.* at 309. Accordingly, the *Lauritzen* factors are of variable importance depending upon the circumstances ofthe particular case. *Lauritzen*, 345 U.S. at 582; *Romero*, 358 U.S. at 486.

This action involves contacts with several countries. The alleged "wrongful act" occurred in Greece; the vessel flew the British flag and was registered in the U.K. dependency of Gibraltar; the plaintiff's domicile is Italy; the shipowner's domicile is Gibraltar; and the United States provides the forum. This case also has contacts with France, the domicile of the defendant B.V.; however, neither party contends that French law controls this case. The remaining *Lauritzen* factors are irrelevant in this action: the plaintiff's allegations sound in tort, not contract, and the inaccessibility of a foreign forum is not at issue.

The defendant argues that the significance of the British contacts indicates that British law applies. These contacts include the flag of the ship, the place of incorporation of the shipowner, and the arbitration clause in the main charter. The plaintiff responds that the law of the flag of the ship is irrelevant because it is a flag of convenience only, and the flag state has no real interest in this litigation because the shipowner is not a party to this suit. The plaintiff urges this Court to apply the law of the United States instead because this case has substantial contacts with this country.

When, as here, the *Lauritzen* factors "point indiscriminately to much of the globe," *Sundance*, 7 F.3d at 1082 (quoting *Sundance Cruise Corp. v. American Bureau of Shipping*, 799 F. Supp. 363, 387 (S.D.N.Y. 1992), *aff'd*, 7 F.3d 1077 (2d Cir. 1992), the law of the flag governs absent of proof that

another nation has a more significant, countervailing interest. The plaintiff has made no such showing.

Rather than being irrelevant, as the plaintiff argues, the law of the flag is particularly appropriate under the circumstances of this case because it is a unifying factor that can govern the potential liabilities of a classification society to third parties with whom the society has no direct contractual relations. Here, B.V. entered into its contract with the ship's owner, a Gibraltar corporation, and issued its classification certificate for a British flag vessel. B.V. had no direct relationship with any cargo interests who subsequently chartered the vessel from the ship's owner. B.V.'s relations were with the ship's owner and related to its classification of a British flag vessel. In addition, the vessel was subject to British manning laws. Numerous different cargo interests from around the world could potentially enter into charters or subcharters for the vessel. Without the certainty of the law of the flag, the law governing any potential liability to third parties would be indeterminate, requiring classification societies to take into account possible liabilities under an unlimited number of laws. *Compare Effron v. Sun Line Cruise Inc.*, 94 Civ. 9279, 1995 WL 546238, *4 (2d Cir. Sept. 11, 1995) (upholding validity of forum selection clause in passenger ticket, noting that because passengers hail from all 50 states as well as several foreign countries, the Greek cruise line "has a special interest in limiting the fora in which it potentially could be subject to suit" (quoting *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991)). Although *Lauritzen* itself involved the law to be applied to a seaman injured on a vessel that sails around the world, its rationale that the law of the flag controls due to the practical difficulties of applying the laws of all the territories into which a ship sails is also true for potential liabilities by the classification society to third parties. Furthermore, this is not a case where the flag country is a "sham." Carbotrade has failed to offer any evidence that the shipowner selected a flag in order to avoid application of the laws of more stringent countries.

The plaintiff's argument that United States law should govern this case is not persuasive. Carbotrade contends that federal maritime law governs because Essex is a New Jersey-based partnership that used a New Jersey chartering broker, the defendant has several branch offices in the United States and conducts classification surveys of vessels at numerous United States ports, the STAR OF ALEXANDRIA was inspected four times at a United States port in the last ten years, the United States Coast guard was involved in rescue operations of the vessel, and the vessel sank in international waters off the coast of Massachusetts. Although it is clear that both the vessel and B.V. have had minimal contacts with the United States, such contacts only justify the exercise or personal jurisdiction over such parties, not the application of United States law. In addition, none of the contacts the plaintiff lists is relevant in this action. Neither party is based in the United States, and none of the significant events relating to the classification and loss of the vessel and the plaintiff's cargo occurred in the United States. This is an action by an Italian corporation against a French corporation alleging reliance on a classification certificate for a British vessel owned by a British company and inspected in Greece, and which sank in international waters. The only significant connection between this action and the United States is that the plaintiff brought the case here. This contact alone does not justify the application of United States law.[4]

The plaintiff halfheartedly argues in the alternative that Greek law should govern this action based on the theory of lex loci delicti commissi. The Supreme Court has explicitly stated, however, that the choice-of-law principles that govern

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[4] Indeed, as the Supreme Court has noted, the application of United States law under such circumstances quite possibly threatens the due process rights of the litigants. *Lauritzen*, 345 U.S. at 590 ("We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state.") (citing *Hartford Accident & Indemnity Co. v.* Delta & Pine Land Co., 292 U.S. 143; *Home Ins. Co. v. Dick*, 281 U.S. 397).

maritime cases "do not depend upon a mechanical application of a doctrine like that of lex loci delicti commissi." *Romero*, 358 U.S. at 383. This standard "is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag." *Lauritzen*, 345 U.S. at 584. In this case, B.V. originally classed and subsequently has conducted surveys to reaffirm the class of the STAR OF ALEXANDRIA in a number of different places, including the United States, Japan, Gibraltar, Malta, and Greece. Tisdale Aff., Exh. 5 (copies of classification reports for the STAR OF ALEXANDRIA). B.V. renewed the classification of the STAR OF ALEXANDRIA for almost 30 years pursuant to surveys conducted in ports all over the world. Accordingly, third parties that charter this vessel may allegedly rely on this certification in any number of countries, exposing B.V. to numerous different laws. Lex loci delicti commissi is therefore clearly inappropriate for this sort of action.

In sum, the plaintiff has failed to demonstrate that the interests of any other country are sufficiently strong to rebut the presumption that the law of the flag applies. *See Lauritzen*, 345 U.S. at 585 (the law of the flag applies "unless some heavy counterweight appears").

IV.

Under British law, the defendant is entitled to summary judgment. The present case falls squarely within the House of Lord's recent decision in *Marc Rich & Co. v. Bishop Rock Marine Co., Ltd. (The NICHOLAS H)* (July 6, 1995), which held that a classification society does not owe a third-party cargo owner a duty of care capable of giving rise to liability for damages stemming from lost cargo.

Nothing about the current case distinguishes it from *NICHOLAS H.* If anything, the case for liability in *NICHOLAS H.* was stronger than in the present case. In *NICHOLAS H.*, a cargo owner sued the defendant classification society Nippon Kaiji Kyokai ("N.K.K.") in tort for the total loss of cargo on board the vessel NICHOLAS H. During its voyage,

the NICHOLAS H. developed a crack in her hull. At the request of the United States Coast Guard, the vessel docked off the shore of Puerto Rico, where N.K.K. performed a survey of the damage. *NICHOLAS H.*, slip op. at 17. Although the surveyor recommended that the vessel be dry-docked for repairs, the shipowners persuaded the surveyor to permit temporary repairs instead. *Id.* After the temporary repairs were completed, the surveyor recommended that the vessel remain in class, thus permitting it to continue its journey across the Atlantic. *Id.* Soon after, the ship sank and the cargo was completely lost. *Id.* at 18. The cargo owner alleged that N.K.K. was responsible for the vessel's sinking and thus liable for the cargo loss because N.K.K. negligently permitted the ship to remain in class despite the crack in its hull.

The House of Lords declined to hold the classification liable. The House of Lords explained that in order to impose a duty of care, there must be (1) foreseeability of harm to the plaintiff; (2) an appropriate relationship between the parties; and (3) a situation in which it is "fair, just and reasonable to impose a duty of care." *Id.* at 21-22.

Lord Steyn points out in his opinion that "[i]n England no classification society engaged by owners to perform a survey has ever been held liable to cargo owners on the ground of a careless conduct of any survey." *Id.* at 17. In the course of finding no liability for the classification society in *NICHOLAS H.*, Lord Steyn explained some of the policy reasons that argued against the imposition of such liability.

> [I]f a duty of care is held to exist in this case, the potential exposure of classification societies to claims by cargo owners will be large. That greater exposure is likely to lead to an increase in the cost to classification societies of obtaining appropriate liability risks insurance. Given their role in maritime trade classification societies are likely to seek to pass on the higher costs to owners. Moreover, it is readily predicable [sic] that classification

> societies will require owners to give appropriate indemnities. Ultimately, shipowners will pay.

Id. at 26. Lord Steyn continued:

> At present the system of settling cargo claims against shipowners is a relatively simple one. The claims are settled between the two sets of insurers. If the claims are not settled, they are resolved in arbitration or court proceedings. If a duty is held to exist in this case as between the classification society and cargo owners, classification societies would become potential defendants in many cases. An extra layer of insurance would become involved. The settlement process would inevitably become more complicated and expensive. Arbitration proceedings and court proceedings would often involve an additional party. And often similar issues would have to be canvassed in separate proceedings since the classification societies would not be bound by arbitration clauses in the contracts of carriage. if such a duty is recognised, there is a risk that classification societies might be unwilling from time to time to survey the very vessels which most urgently require independent examination. It will also divert men and resources from the prime function of classification societies, namely to save life and ships at sea. These facts are, by themselves, far from decisive. But in an overall assessment of the case they merit consideration.

Id. at 28. He concluded:

> I conclude that the recognition of a duty would be unfair, unjust and unreasonable as against the shipowners who would ultimately have to bear the cost of holding classification societies liable, such consequence being at variance with the bargain between shipowners and cargo owners based on an internationally agreed contractual structure. It would also be unfair, unjust and unreasonable

> towards classification societies, notably because they act for the collective welfare and unlike shipowners they would not have the benefit of any limitation provisions.

Id. at 29. This reasoning is equally applicable to the present case. As in *NICHOLAS H.*, the plaintiff in the current case has not presented evidence of any relationship between the cargo interests and B.V.; instead, liability is sought to be imposed based on Carbotrade's alleged foreseeable reliance on B.V.'s classification of the vessel. That is plainly insufficient under British law. It is clear that under British law B.V. would not qualify as the first classification society ever to have been held liable to cargo owners for performing an allegedly negligent survey when it was engaged by the shipowner.

IV.

Summary judgment for the defendants is also appropriate even if the general maritime law of the United States governs this action.[5] The Court of Appeals recently held that a classification society cannot be held liable in tort to a shipowner. *Sundance*, 7 F.3d at 1084. In *Sundance*, the Court of Appeals distinguished the case before it "from a suit brought by an injured third party who relied on the classification society or safety certificates." *Id.*; *see also International Ore Fertilizer Corp. v. SGS Control Servs.*, 38 F.3d 1279, (2d Cir. 1994) (discussing the scope of this exception and the tort of negligent misrepresentation), *cert. denied*, No. 94-1686, 1995 WL

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[5] The Court of Appeals has explicitly refrained from determining whether federal maritime law or state law should govern cases involving alleged negligent misrepresentation. See *International Ore & Fertilizer Corp. v. SGS Control Services, Inc.*, 38 F.3d 1279, 1283 n.1 (2d Cir. 1994), *cert. denied*, No. 94-1696, 1995 WL 251785 (U.S. June 5, 1995). In *International Ore*, the Court held that it was unnecessary to make such a determination because "we believe that the disposition of this case would be the same under either federal maritime or New York law." *Id.* In the same opinion the court explicitly noted that the New York case *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), reflects federal maritime law. *Id.* at 1284.

251785 (June 5, 1995). The issue then becomes whether this case falls within the possible exception to the nonliability rule left open in *Sundance*.

Although the *Sundance* court did not explicitly indicate the standards to be applied to assess potential third-party liability, the court cited the New York cases *Ultramares Corp. v. Touche et al.*, 255 N.Y. 170, 174 N.E. 441 (1931) (Cardozo, J.) and *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) (Cardozo, C.J.).[6] Both cases and their progeny indicate that the imposition of liability for negligent misrepresentations that are relied upon by parties who did not employ the defendant is only appropriate where there is a relationship approaching privity between the defendant and the third party.[7]

In *Glanzer*, the New York Court of Appeals found that one owes a duty to a third party when the third party's reliance "was a consequence which, to the [defendant's] knowledge, was the end and aim of the transaction." 233 N.Y. 236, 238-39, 135 N.E. at 275. In that case, a bean seller contracted with the defendant, a public weigher, to certify the weight of goods that had been sold to the plaintiff. Pursuant to the bean seller's instructions, the public weigher provided copies of the weight certificate to both the seller and the buyer, who then made payment for the goods in reliance upon representations

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[6] The Court of Appeals recently affirmed that New York law, and *Glanzer* in particular, "reflects federal maritime law." *International Ore*, 38 F.3d at 1284.

[7] This was also the type of relationship that the House of Lords left open in *NICHOLAS H.* as a possible basis for liability.

> It is possible to visualize a direct exchange between cargo owners and a classification society, in the context 'of a survey on behalf of owners of a vessel laden with cargo, which might give rise to an assumption of responsibility. . . . In the present case there was no contact whatever between these cargo owners and the classification society."

Slip op. at 24. As explained below, this case is also a case of absolutely no direct contact between the classification society and the plaintiff.

the bean weigher had made in the certificate. In permitting the buyer to sue the public weigher for negligence, the court held that the defendants

> "knew that the beans had been sold, and that on the faith of the certificate payment would be made. They sent a copy to the plaintiffs for the very purpose of inducing action. All this they admit. In such circumstances, assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed."

Id. at 239.

In *Ultramares*, the court refused to extend this noncontractual duty of care in *Glanzer* to public accountants who prepared reports that were later exhibited by the accountants' client to indeterminate parties. The court distinguished *Glanzer* on the following grounds:

> In *Glanzer v. Shepard*, [there] was something more than the rendition of a service in the expectation that the one who ordered the certificate would use it thereafter in the operations of his business as occasion might require. Here was a case where the transmission of the certificate to another was not merely one possibility among many, but the 'end and aim of the transaction.' . . . Not so in the case at hand. No one would be likely to urge that there was a contractual relation, or even one approaching it, at the root of any duty that was owing from the defendants now before us to the "indeterminate class of persons who, presently or in the future, might deal with the [accountants' client] in reliance on the audit. In a word, the service rendered by the defendant in *Glanzer v. Shepard* was primarily for the information of a third person, in effect, if not in name, a party to the contract, and only incidentally for that of the promisee.

255 N.Y. at 182-83, 174 N.E. at 445-446. The court concluded that the imposition of liability is appropriate only when the connection between the parties is "so close as to approach that of privity, if not completely one with it." *Id.*

Recent decisions of the New York Court of Appeals affirm this near-privity requirement. *In Credit Alliance Corp. et al. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 493 N.Y.S.2d 435 (1985), *modified*, 66 N.Y.2d 812, 498 N.Y.S.2d 362 (1985), the New York Court of Appeals articulated the relevant factors for determining when an accountant can be liable, absent privity, to a third party who relies to his detriment on negligently prepared financial reports. Basing its holding on *Glanzer* and *Ultramares*, the court explained that before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports:

> (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.

Id. at 551, 493 N.Y.S.2d at 443. These factors require a third party seeking recovery to demonstrate a relationship between the parties that is "'sufficiently approaching privity'" to justify the imposition of liability. *Security Pacific Business Credit v. Peat Marwick Main & Co.*, 79 N.Y.2d 695, 586 N.Y.S.2d 87 (1992) (quoting *Westpac Banking Corp. v. Deschampq*, 66 N.Y.2d 16, 19, 494 N.Y.S.2d 848 (1985)); *see Credit Alliance*, 65 N.Y.2d at 545, 493 N.Y.S.2d at 440 (a relationship approaching privity "remains valid as the predicate for imposing liability"). Liability to a third-party will not be imposed upon the basis of foreseeability only; there must be "actual conduct [by the defendant] linking [it] to the

noncontractual party." *Credit Alliance*, 65 N.Y.2d at 553 n.11, 493 N.Y.S.2d at 444 n.11.

Here there was no conduct on the part of B.V. that linked it to the cargo owner. Accordingly, under the principles of *Glanzer* and *Ultramares*, which the Court of Appeals for the Second Circuit has relied upon for federal maritime law, B.V. owed no duty to the plaintiff and therefore cannot be liable to it for breaching such a duty. It is undisputed in this case that there was no communication between B.V. and the plaintiff that would link B.V. and the plaintiff and evince B.V.'s understanding of the plaintiff's alleged reliance. Accordingly, B.V. bears more resemblance to the accountants in *Ultramares* than the bean weigher in *Glanzer*. Although B.V. may have been aware that its class certificates are shown to third parties, in this case this possibility was "'merely one possibility among many,'" not "'the end and aim of the transaction.'" *Credit Alliance*, 65 N.Y.2d at 549, 493 N.Y.S.2d at 442 (quoting *Ultramares*, 255 N.Y. at 182). As the Second Circuit Court of Appeals recently held in *Sundance*, "the purpose of the classification certificate is not to guarantee safety, but merely to permit [the shipowner] to take advantage of the insurance rates available to a classed vessel." 7 F.3d at 1083; *see also* Tisdale Aff., Exh. 11 (Stavropoulos) at 2 (stating that owner wants ship to be in class so that ship can be insured). Because B.V. did not survey the STAR OF ALEXANDRIA primarily for the benefit of Carbotrade or Essex, it does not owe these parties a duty of care. As the court in *Sundance* noted, a contrary rule that allocated all risk of loss to the classification society would make it impossible for the ship classification industry to continue to exist. *Sundance*, 7 F.3d at 1084.

Finally, even if Bureau Veritas owed a duty to Carbotrade, which the Court finds it did not, Carbotrade could not recover on its claim of negligent misrepresentation unless there was evidence that it actually and reasonably relied on the classification certificate B.V. issued. *See Sundance*, 7 F.3d at 1084; *Glanzer*, 233 N.Y. at 242, 135 N.E. at 277. To make this showing, the plaintiff must establish that the defendant: "(1)

at plaintiff's request, supplied information for its guidance; (2) failed to use reasonable care in so doing; (3) knew plaintiffs would rely on the information for particular purposes; and (4) plaintiff suffered an economic loss because it relied on the information." *Sundance*, 799 F. Supp. at 382, *aff'd*, 7 F.3d 1077.

Carbotrade has failed to establish that it actually relied on B.V.'s classification of the STAR OF ALEXANDRIA. The plaintiff's claim of reliance is undercut by the fact that the cargo interests accepted the Notice of Readiness and began loading cargo on March 21, 1989, several days before B.V. had completed the intermediate survey and extended the vessel's certification. In fact, the most recent visa extending the deadline for a dry dock bottom survey had expired on March 20, 1989, a day before the date the plaintiff began to load the cargo aboard the vessel, and was not extended again until March 28, 1989, when the loading was virtually complete. Furthermore, even if the cargo interests' independent surveyor reviewed the certificate on March 28, 1989, as Carbotrade claims, it is undisputed that the surveyor was aware of the leakage in the wing tanks and had authority under the charter to fail the vessel for inspection. Under the terms of the head charter and the subcharter, the chartering parties had a right to refuse the vessel after their own surveyor inspected the cargo areas, but they did not do so. In this case, the plaintiff was fully aware of the ship's defects and had an opportunity to remedy them, but instead chose to do nothing. *See Great American Ins. Co. et al. v. Bureau Veritas*, 338 F. Supp. 999, 1011 (S.D.N.Y. 1972) (rejecting a negligent misrepresentation claim against a classification society because the vessel's owner and charterer had "knowledge and opportunity to remedy the defects" but "elected to do nothing"). Therefore, the defendant is entitled to judgment as a matter of law that the plaintiff did not rely on the defendant's representations.

V.

For the reasons stated above, the defendant's motion for summary judgment is granted. The Clerk of the Court is

directed to enter such a judgment and to close the abovecaptioned action.

SO ORDERED.

Dated: New York, New York
October 18, 1995

/s/ John G. Koeltl
John G. Koeltl
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of January, one thousand nine hundred and ninety-seven.

Carbotrade SPA

<Appellant>

v

Veritas

<Appellee>

Dkt No: 95-9155

UNITED STATES COURT
OF APPEALS
FILED JAN. 9 1997
GEORGE LANGE III, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee <Bureau Veritas>.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney